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5.1 Introduction

The Terms of Reference require the Council to consider whether current penalties imposed for rape and sexual assault offences are aligned with community views about the seriousness of these offences. In addition, the Council must also expressly refer to:

- commentary expressing that penalties currently imposed on sentences for sexual assault and rape offences may not always meet the Queensland community's expectations;
- the general expectation of the Queensland community that penalties imposed on offenders convicted of … sexual assault and rape offences are appropriately reflective of the nature and seriousness of … sexual violence; and
- the need to promote public confidence in the criminal justice system.[1]

This chapter provides an overview of research into public opinion about offence seriousness and sentencing levels, and the findings from research commissioned by the Council to examine Queenslanders' views about the seriousness of rape and sexual assault offences. It also explores views expressed to the Council during consultations, submissions and interviews on seriousness and whether sentences for sexual assault and rape are appropriate and adequate.

5.2 How community views informed this review

Community attitudes about the seriousness of offences can be a valuable indicator of how sentencing courts should treat these offences. While community members may hold a range of views on the seriousness of different offences, community attitudes as a whole can be objectively measured and thus serve to 'function as a source of information on offence seriousness'.[2]

Research has found that public opinion can have a legitimate role to play in sentencing; however, it should not determine sentencing outcomes. Judicial discretion must be maintained and only informed public opinion should influence sentencing and policy.[3]

Research into public opinions and sentencing of sexual offences has consistently found that the public are punitive in their views towards sexual offenders and generally consider sentences given to offenders too lenient. This suggests a misalignment between community and judicial views about adequate sentences for sexual offences.

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1 See Appendix 1, Terms of Reference.
2 Sentencing Advisory Council (Victoria), *Community Attitudes to Offence Seriousness* (Final Report, 2012) 9 ('*Community Attitudes to Offence Seriousness* report').
3 Kate Warner et al, 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment and Society* 181.

In order for the Council to assess the appropriateness and adequacy of sentencing outcomes for rape and sexual assault, we needed to understand community views of the seriousness of these offences. The Council commissioned the Sexual Violence Research and Prevention Unit at the University of the Sunshine Coast ('UniSC') to explore community views about sentencing sexual assault and rape offences. The Council also commissioned the Griffith University Criminology Institute to prepare and publish an updated working paper on their Crime Harm Index, which provides a measure of the perceived harm caused by an offence relative to other offences. The methodologies of these studies can be found in **Chapter 4**.

This research suggests the Queensland community regards sexual offences against children as more serious than sexual offences committed against an adult. The only offence that both studies ranked more seriously than sexual offences against a child was murder. Participants in the UniSC research identified that the level of harm experienced by the victim survivor, the circumstances of the offending and the culpability of the perpetrator for the suffering inflicted all contribute to offence seriousness.

These findings informed the Council's conclusions about the seriousness of rape and sexual assault offences in **Chapter 6**.

The community views evidence presented in this chapter, in combination with other evidence gathered as part of this review, have been an important aspect of assessing the 'adequacy' and 'appropriateness' of current sentencing outcomes in **Chapter 7**.

5.3 Public opinion on sentencing

There has been increasing domestic and international research and inquiry into public opinion about sentencing and the role that public opinion should play.[4] Australian-based research has also increased due to the establishment of sentencing councils in New South Wales, Queensland, South Australia, Tasmania and Victoria.[5] Consistent growth in this body of research is also linked to community interest in the sentencing of high-profile cases, typically as a result of media reporting and subsequent community commentary.[6]

Researchers have found that public opinion has a legitimate role to play in sentencing, noting that '[c]ourts have acknowledged that concern with maintaining public confidence in the administration of justice means that courts cannot dismiss public opinion as having no relevance'.[7]

The Queensland Court of Appeal has said that while '[p]ublic clamour about a particular case has to be ignored by a sentencing judge', on the basis that 'it is not a reliable indicator of legitimate public expectations of the system of justice or of anything else relevant to sentencing',

> community attitudes, standards and expectations are things that a sentencing judge must somehow take into account because, in general, sentences are supposed to reflect a community's values. That is one reason why 'denunciation' is a factor in sentencing.[8]

4 United Kingdom, House of Commons Justice Committee, *Public Opinion and Understanding of Sentencing: Tenth Report of Session 2022-23* (2023) ('*Public Opinion and Understanding of Sentencing* report'); Kate Warner, 'Sentencing Review 2009–2010' (2010) 34 *Criminal Law Journal* 385, 395; Julian V. Roberts and Michael J. Hough, *Understanding Public Attitudes to Criminal Justice* (Open University Press, 2005), 68–9.
5 Warner, 'Sentencing Review 2009–2010' (n 4) 97–9.
6 Roberts and Hough (n 4) 68–9.
7 Warner, 'Sentencing Review 2009–2010' (n 4) 395.
8 *R v O'Sullivan; Ex parte A-G (Qld)* [2019] QR 196, [101] ('*O'Sullivan*').

The Court, referring to earlier statements made by the High Court in *Markarian v The Queen*[9] ('*Markarian*'), said:

> Public responses to sentencing, although not entitled to influence any particular case, have a legitimate impact upon the democratic legislative process. Judges are aware that, if they consistently impose sentences that are too lenient or too severe, they risk undermining public confidence in the administration of justice and invite legislative interference in the exercise of judicial discretion. For the sake of criminal justice generally, judges attempt to impose sentences that accord with legitimate community expectations.[10]

In this context, '[b]eing sensitive to the community's attitude about a particular kind of offence is part of the exercise of judicial discretion'.[11] This does not extend, however, to the consideration of the appropriate sentence in an individual case.[12]

Consistent with statements made by the High Court, research has identified 3 important factors when considering how much, or in what ways, public opinion should inform sentencing:

- First, while public opinion is relevant to sentencing, it should not determine sentencing outcomes in individual cases.
- Second, maintaining judicial discretion is critical to enabling the imposition of a just and appropriate sentence in any individual case. Every case is different, and courts should sentence on the basis of the facts associated with an individual case.
- Third, only informed public opinion should influence sentencing and policy development.[13]

The third aspect is particularly important, given that research suggests people's perceptions of seriousness and sentencing are often based on incorrect information or misconceptions.[14] For example, public perceptions that sentencing is 'lenient' are typically associated with misunderstandings of the sentencing process and with limited information about specific cases. However, that 'perception is often dispelled when individuals are provided with the factors and circumstances of a specific case'.[15] Research has observed that the penalty options that can be imposed for particular offences and the role that sentencing can realistically assume in reducing or controlling overall crime often differs from what communities assume or expect.[16] This is particularly so with cases subject to extensive media coverage that may evoke public outrage.

Collectively, research has found that inviting the public 'in' and promoting positive and informed public opinion is worthy of investment.[17] Criminal justice systems without public confidence lack legitimacy and can be functionally compromised by persistent misconceptions, under-reporting of offences, limited cooperation and distorted perceptions of crime and criminal justice.[18]

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9 *Markarian v The Queen* (2005) 228 CLR 35 ('*Markarian*').
10 *O'Sullivan* (n 8) [102] citing *Markarian* (n 9) 389 [82] (McHugh J).
11 Ibid [103].
12 Ibid [201].
13 Warner et al (n 3) 181.
14 Nigel Stobbs, Geraldine Mackenzie and Karen Gelb, 'Sentencing and public confidence in Australia: The dynamics and foci of small group deliberations' (2014) 48(2) *Australian and New Zealand Journal of Criminology* 219, 221–2; Roberts and Hough (n 4) 74.
15 *Public Opinion and Understanding of Sentencing* report (n 4) 2.
16 Roberts and Hough (n 4) 69.
17 Warner et al (n 3) 180; Kate Warner et al, 'Are Judges Out of Touch?' (2014) 25(3) *Current Issues in Criminal Justice* 729, 730.
18 Sentencing Advisory Council (Victoria), *More Myths and Misconceptions* (2008) 2, 5–6 ('*More Myths and Misconceptions*'); Warner et al, 'Are Judges Out of Touch?' (n 17) 738–9.

5.3.1 Key themes from public opinion research

National and international research that has explored public views of sentencing has identified three clear themes. These themes are prominent when people are asked to respond to abstract questions about their perceptions of sentencing and the courts, without any associated information.[19]

First, several studies have found that when responding to a general opinion poll, the overwhelming majority of people consider that sentences are too lenient and that judges are 'out of touch' – factors that influence perceptions of sentencing and the criminal justice system more broadly.[20]

> On the whole, this research highlights that members of the public overestimate the seriousness of a crime and have limited understanding of the sentencing process, but overwhelmingly consider sentencing to be excessively lenient. Yet, paradoxically, when provided with case scenarios and asked to suggest appropriate sentences, people are more likely to suggest sentences that closely align to actual sentences, indicating the need for greater public awareness-raising about sentencing practices.[21]

Second, as noted above, there are misconceptions about the criminal justice system that affect opinions of sentencing, the courts and judicial officers. A Victorian Sentencing Advisory Council ('VSAC') paper that reviewed relevant public opinion research concluded that public perceptions about crime and criminal justice are the 'strongest predictors of punitiveness'.[22] It noted that these attitudes are underpinned by inaccurate beliefs about the criminal justice system.[23] Confidence in the courts was found to have 'immediate relevance to perceptions of sentencing severity' as 'people who report that sentences are too lenient have significantly less positive views of sentencers'.[24]

Representative research in the United Kingdom revealed 'a rather negative public image of judges'[25] compared with other professions. This research further found that, 'relative to other branches of the criminal justice system, such as police, the courts do not fare well in terms of public performance ratings'.[26] The vast majority of respondents in this study believed courts respected the rights of an accused (a factor they rated to be the least important function), yet were not as effective in securing convictions (rated the most important function) or imposing the right sentence (rated the second most important function).[27] This research finding has been replicated in other jurisdictions.

Third, research has also identified that public awareness of courts and sentencing is limited.[28] A lack of awareness of, and less positive opinions about, crime, courts, sentencing, criminal justice systems and judicial officers, have been detected in Australian, American, Canadian and UK research.[29] Research reveals that as people become more informed, they report less-punitive views on crime, sentencing and offenders.[30] VSAC has noted:

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19 *More Myths and Misconceptions* (n 18) 1–2, 4; Warner et al 'Are Judges Out of Touch?' (n 17) 738–9.
20 *Public Opinion and Understanding of Sentencing* report (n 4) Chapter 3; Susan Reid et al. *Public Perceptions of Sentencing For Causing Death by Driving Offences* for the Scottish Sentencing Council (2021) 4; *More Myths and Misconceptions* (n 18) 2, 4; Stobbs, Mackenzie and Gelb (n 14) 219–21; Warner et al (n 3) 181; Warner et al, 'Are Judges Out of Touch?' (n 17) 729.
21 Oona Brooks-Hay et al. *Victim-Survivor Views and Experiences of Sentencing for Rape and Other Sexual Offences for the Scottish Sentencing Council* (2024) 9.
22 *More Myths and Misconceptions* (n 18) 3.
23 Ibid.
24 Ibid.
25 Roberts and Hough (n 4) 74.
26 Ibid 70.
27 Ibid 70–71.
28 Roberts and Hough (n 4) 69–70.
29 *More Myths and Misconceptions* (n 18) 3–6; *Public Opinion and Understanding of Sentencing* report (n 4) 36–40.
30 Stobbs, Mackenzie and Gelb (n 14) 219–21; *More Myths and Misconceptions* (n 18) 6–8.

> There is now a significant body of research that shows that, when the public is provided more information on a given case (similar to the kind of information available to a judge in court), judicial sentences and public sentences are very similar.[31]

A well-known series of Australian projects exploring community attitudes to sentencing, known collectively as 'The Australian Jury Projects', explored jurors' views of sentencing and areas of commonality or departures from actual sentencing practices.[32] These are discussed in more detail in section 5.3.2

The second study undertaken as part of this research in Victoria ('the Victorian Jury Sentencing Study') found that when informed of the situational and contextual factors of individual cases, the 'views of judges and jurors are much more closely aligned than mass public opinion surveys would suggest'.[33]

Targeted and multidimensional research has attempted to redress the limitations of previous 'off the top of the head' polling questions in gauging public opinion and the factors that influence these views.[34] At an aggregate level, research now shows that 'although public attitudes can be complex, contradictory and dependent upon question wording, people are generally much less punitive than is often thought'.[35] This shows the importance of informed public opinion as a basis for developing responsive public policy.[36]

The Victorian Jury Sentencing Study used a mixed-methods approach[37] to support previous juror-focused research conducted in Tasmania. The study found that the majority of jurors indicated that sentences were appropriate when provided with more detailed information about the facts of the case, and that people will consider the individual circumstances of cases when provided with sufficient information.[38] In addition, the jury studies confirm that as knowledge about the criminal justice system and the individual facts of a case increases, people self-report less-punitive attitudes about sentencing and reflect more supportive opinions of judges and the courts.

5.3.2 Research about sexual violence sentencing

Research into public opinions and sentencing of sexual offences consistently suggests members of the public are punitive in their views towards sexual offenders and consider sentences given to offenders are too lenient and that, consequently, there is a gap between the public and, for example, judges in terms of views of appropriate sentences.[39]

Some studies suggest public views of appropriate sentencing levels for sexual offences are based on 'stereotypical and sensationalist views of sexual offending', which are often informed by the media.[40]

The literature review prepared for the Council identified the following key themes arising from research on community attitudes to sentencing for sexual offences:

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31 *More Myths and Misconceptions* (n 18) 7.
32 For more information, see 'The Jury Projects', *University of Tasmania* (web page) <https://www.utas.edu.au/law/research/the-jury-projects>.
33 Warner et al (n 3) 180.
34 *More Myths and Misconceptions* (n 18) 4; Stobbs, Mackenzie and Gelb (n 14) 222–4; Warner et al (n 3) 198.
35 *More Myths and Misconceptions* (n 18) 8.
36 Warner et al (n 3) 181–2.
37 Ibid 183–4.
38 Ibid 181; Kate Warner et al, 'Why Sentence? Comparing the Views of Jurors, Judges and the Legislature on the Purposes of Sentencing in Victoria, Australia' (2017) 19(1) *Criminology and Criminal Justice* 26.
39 Carol McNaughton et al. *Attitudes to Sentencing Sexual Offences* (Centre for Gender and Violence Research, University of Bristol for the Sentencing Council of England and Wales, 2012) 15.
40 Ibid.

- 'Public perceptions about sentencing for sexual offences are multifaceted, frequently representing a balance between punishment, rehabilitation, and community protection.
- Public views on sentencing are influenced by individual demographics, personal experiences, and the circumstances of the offence' including views about the causes of sexual offending.[41]

The review authors concluded that much of the research reviewed 'suffers from serious methodological limitations that influence the interpretation of findings'.[42]

These limitations aside, the review authors reported the following key findings:

- Research shows that the public considers many of the same factors as judges when considering sentencing, such as culpability and harm.
- Studies reveal that members of the community prescribe sentences that are largely consistent with those handed down by courts.
- Research findings demonstrate that the public is frequently punitive in the abstract but become less so when faced with specifics about crime and justice.
- Australian public opinion research about sentencing in cases of sexual violence appears largely consistent with the results obtained in studies performed in other countries and contexts.
- Many studies find that the public supports compulsory treatment for perpetrators of sexual violence although they also express scepticism regarding offenders' capacity to change.[43]

Exploring Australian-based research only, the authors concluded:

> Collectively, research on public perceptions of sentencing for sexual offences in Australia reveals that rape myths (i.e. misconceptions about sexual violence) influence people's judgments about the seriousness of sexual offending and the most appropriate sentences in those cases. At the same time, however, the public's opinions on sentencing tend to consider many of the same factors deliberated by courts. While the community sometimes expresses that sentences are too lenient, members of the public often recommend sentences that are roughly similar to (or even more lenient than) the sentences handed down by magistrates and judges. Overall, these findings highlight the complex nature of public perceptions of sentencing for sexual offences.[44]

The Victorian Jury Sentencing Study found 'the gap between the jurors' and judges' sentences widened for certain offence types; specifically, while 50% of jurors suggested more lenient sentences than the judge, this reduced to 36% in cases of child sexual assault wherein the victim is younger than 12'.[45]

A subsequent national study, which had as its focus the perspectives of jurors in sexual offence trials, found 'the majority of jurors believed the sentence was very or fairly appropriate'.[46] Both empanelled jurors and unempanelled jurors in the national study were less likely to see the sentence as appropriate (very or fairly) for sex offences against children than for sex offence against adults (84% vs 97% for empanelled jurors, and 75% vs 81% for unempanelled jurors).[47]

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41 Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences* (Literature Review prepared by Griffith University for the Queensland Sentencing Advisory Council, 2024) ('*Griffith University Literature Review*') 100.
42 Ibid.
43 Ibid 100–1.
44 Ibid 104.
45 Ibid citing Warner, Davis, Spiranovic, Cockburn, & Freiberg (2017).
46 Ibid citing Kate Warner, Lorana Bartels and Karen Gelb, 'Jurisdictional Differences in Sentencing Practice: Insights from the National Jury Sentencing Study' (2022) 34(3) *Judicial Officers Bulletin* 27; Kate Warner et al, 'Comparing Legal and Lay Assessments of Relevant Sentencing Factors for Sex Offences in Australia' (2021a) 45(1) *Criminal Law Journal* 57; Kate Warner et al, 'Public Perspectives on Judges' Reasons for Sentence' (2021b) 95(9*) Australian Law Journal* 685.
47 Warner et al (2021b) (n 46) 689.

Victorian research

Research undertaken by VSAC into community views on offence seriousness found sexual offences against young children were viewed by the community as among the 'most serious'.[48] This research, which involved the hosting of community panels across metropolitan and regional Victoria as well as an online forum, found that the age of the victim, the relationship of trust, the physical aspects of the offending and the harms done to child victims of sexual offences were long-lasting and severe, and that these were relevant factors that underpinned the seriousness of such offending.[49] For many participants, the nature of the physical behaviour involved (including whether it involved a penetrative act or not) was not viewed as determinative of offence seriousness 'because the primary nature of the harm involved was psychological, stemming from the sexual abuse and invasion of the child's integrity'.[50]

In the case of sexual offences against adults, this study found:

> The close ranking of rape and attempted rape shows the offender's intention to rape was highly influential in participants' rankings as both a harm and a culpability factor. Many participants saw the culpability and the harms flowing from both offences to be the same, despite that in the attempted rape, sexual penetration did not occur. The substantially lower ranking of indecent assault, where there was no intention to rape, shows these factors had a strong combined effect on the judgment of seriousness.[51]

The Victorian research used a methodology involving short case vignettes being presented to participants. For example:

- The indecent assault was described as the perpetrator approaching the victim on a crowded street and, fully clothed, 'deliberately rubbing his genitals against her bottom', with the defendant running away when the victim pushed him away.
- The rape case was described as a defendant approaching the victim on the street with a knife, forcing her into an alleyway and raping her (penetration type not specified).
- The description of the sexual penetration with a child under 12 was of the perpetrator having 'sexual intercourse' with an 8-year-old girl in her house while her parents were in another room.[52]

A similar methodology was adopted by UniSC for the research that has informed our current review (findings discussed in section 5.4.1).

The Australian Jury Projects

The Victorian Jury Sentencing Study undertaken as part of the Australian Jury Projects explored several aspects of sentencing, including jurors' views about the weight that should be given to aggravating and mitigating factors and the importance of these factors.[53] This study involved 124 trials with 987 participants.

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48 *Community Attitudes to Offence Seriousness* report (n 2) 49, 55–8.
49 Ibid 55.
50 Ibid 57.
51 Ibid 35.
52 Ibid 76.
53 Warner et al (n 3).

This research found that jurors generally attributed 'a lot of weight' to aggravating factors, but either 'no weight at all' or only 'a little weight' to mitigating factors.[54] Significantly more weight was given to aggravating factors than mitigating factors and the effect size was large.[55]

The finding that there is a tendency for community members to place more weight on aggravating factors, and attribute limited weight to mitigating factors is consistent with an earlier study undertaken in England and Wales commissioned by the Sentencing Advisory Panel, although noting methodological differences.[56] The finding also aligns with a later study undertaken for the Scottish Sentencing Council, which found that victim survivors were concerned that perpetrators could manipulate the system by using mitigating circumstances in support of receiving a lenient sentence.[57] Members of the public and survivors of sexual violence also thought more weight should be placed in sentencing on the seriousness of the offence and the impact on victim survivors.[58]

Aggravating factors that jurors in the Victorian Jury Sentencing Study identified as those to which the judge should attribute significant weight in sentencing in cases where these factors arose included that:

- the person abused a position of trust or power (73% of participants);
- the injury, harm or loss caused was substantial (72% of participants);
- the offending was planned or organised (61% of participants);
- the victim was vulnerable (58% of participants); and
- the person being sentenced had prior convictions (53% of participants – which increased to 76.5% where the person had relevant prior convictions).[59]

When informed of the sentence, a majority (87%) considered it either 'very appropriate' (55%) or 'fairly appropriate' (32%), which the authors concluded 'shows that in terms of relative severity the views of judges and jurors are much more closely aligned than mass public opinion surveys would suggest'.[60] However, this was not the case for sexual offences against children under 12 years, with only 36 per cent considering the sentence 'very appropriate' compared with 53 per cent for other types of sexual offences, or 54.8 per cent overall.[61]

A later national study focusing on sex offence cases and including the views of non-jurors as well as jurors across all Australian states and territories compared legal and lay assessment of relevant sentencing factors. This study found the three most commonly arising aggravating factors, which also showed a high degree of concordance between judges and jurors' assessment that this factor should attract 'a lot of weight', were:

- the extent of emotional injury (81% of judges and 85% of jurors);
- victim vulnerability (71% of judges and 88% of jurors); and

54 Ibid 191–2.
55 Ibid 192.
56 Ibid 196 referring to Julian V Roberts and Mike Hough, 'Exploring Public Attitudes to Sentencing Factors in England and Wales' in Julian Roberts and Mike Hough, *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 183.
57 Hannah Biggs et al, *Public Perceptions of Sentencing in Scotland* (July 2021) 18.
58 Ibid 2.
59 Warner et al (n 3) 191–3 and Figure 4.
60 Ibid 193.
61 Ibid 194.

- abuse of power or position of trust (85% of judges and 96% of jurors).[62]

These three factors, together with the case involving more than one victim (81% of judges and 89% of jurors), were given the most weight as aggravating features.[63]

When the categories of 'a lot of weight' and 'a little weight' were combined, the researchers who led this study reported that 'the similarities between judges and jurors were even more striking'.[64]

There were some differences with judges, with jurors more likely to give 'a lot of weight' to all aggravating factors and to give 'a lot of weight' to 'prior convictions', 'offender on bail, parole or probation' and 'extent of physical injury'.[65]

Additional aggravating factors (in addition to those specified) were only identified by one-fifth of jurors, of which the most commonly occurring were age disparity, no remorse and a plea of not guilty.[66]

The authors of this study conclude:

- 'there is considerable alignment between the public and judges with respect to sentencing factors';
- '[j]udges and lay people give more weight to aggravating factors than mitigating factors and are agreed about the most important aggravating factors';
- differences between legal and lay assessments: 'highlight the need for judges to ensure that they clearly explain the rationale for the law's approach to the relevant factor, in order to improve public understanding of sentencing and to help deflect public criticism'.[67]

5.4 Council's research into community views

5.4.1 The University of the Sunshine Coast's community views research and findings

The Council commissioned research conducted by the UniSC to examine community views about sentencing sexual assault and rape offences.

This research explored:

- what the community thought were the most important sentencing purposes for rape and sexual assault offences;
- how the community regarded the seriousness of different types of rape and sexual assault offences; and
- how they ranked the seriousness of these offences in relation to other serious offences.

All participants were Queensland residents. Over one-third of participants in this study identified as being either a direct victim survivor or an immediate family member of a victim survivor of rape or a sexual

62 Warner et al (2021a) (n 46) 62–3 and Table 1.
63 Ibid.
64 Ibid 63.
65 Ibid.
66 Ibid 65. The authors suggest: 'It is noteworthy that some jurors considered that a plea of not guilty and absence of remorse should be aggravating. Neither is a legally recognised aggravating factor. Absence of remorse was frequently mentioned by judges (in 59% of cases); in most cases it was coded as a neutral factor, although the judge appeared to treat this factor as aggravating in 15% of cases'.
67 Ibid 73–4.

assault offence. For information about the methodology adopted and limitations of this research, see **Chapter 4**.

High-level findings are discussed below, and the full UniSC findings are presented in a separate report.[68]

Community views on sentencing purposes

The UniSC research explored the community's views of the most important purposes of sentencing to help the Council determine whether their views align with the courts' assessment of these purposes.

Researchers found that without exposure to contextual information about a case, offence type influences community views on sentencing purposes.

Sexual assault

When asked what the most important sentencing purposes were for sexual assault (described as touching a person's breast without consent), participants identified denunciation (31.6%), deterrence (25.0%) and punishment (28.9%).

However, when presented with a specific case scenario, participants' views changed, with participants overwhelmingly considering community protection to be the most important sentencing purpose (53.9%), followed by punishment (24.7%) and then, to a lesser extent, denunciation (9.0%).

The scenario used was based on *R v Kane, Ex parte Attorney-General (Qld)*.[69] Participants were told that the perpetrator was a stranger who grabbed the adult victim on her way to a train station. He carried her to a secluded area and touched her breasts, undid the top button of her pants and pressed his finger against her anus. He only desisted when a passer-by heard the victim crying and shouting for help. He pleaded guilty and had a criminal history involving robbing a petrol station with a replica gun (but it had been a while ago) and he had problems with alcohol.

The Court of Appeal, in allowing the appeal against sentence, agreed with submissions made on behalf of the Attorney-General that 'in the circumstances of the subject offence' and taking into account the respondent's prior history, which included the use of violence, 'community protection and denunciation warranted a significant penalty'.[70] The Court substituted for the original sentence of 18 months' imprisonment a sentence of 3 years' imprisonment, suspended after the respondent served 282 days (served in its entirety as pre-sentence custody).

Comparing the Court of Appeal's views with community members' views about the most important purposes of sentencing in this case, there is clear alignment between these views.

Rape

For rape (described as having penetrative sexual intercourse with a person without consent), community members initially ranked the most important sentencing purposes as being punishment (50.7%), followed by community protection (35.6%) and (albeit to a far lesser extent) denunciation (8.2%).

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68 See Dominique Moritz, Ashley Pearson and Dale Mitchell, *Community Views on Rape and Sexual Assault Sentencing: Final Report* (Prepared for the Queensland Sentencing Advisory Council by the Sexual Violence Research and Prevention Unit, University of the Sunshine Coast, June 2024) ('*UniSC Final Report*').

69 [2022] QCA 242.

70 Ibid [27].

When presented with a specific case scenario (based on a District Court judgment of *R v DJT)*,[71] this shifted to an almost equal ranking of the purposes of rehabilitation (25.6%), punishment and community protection (23.1% each) and denunciation (at 21.8%).

Participants were advised that the perpetrator and victim had been in a relationship for 2 years, and there was a protection order against the perpetrator which prevented him from being with her within 12 hours of drinking alcohol. One morning she woke and saw he had been drinking. He started engaging in sexual activity with her, but she said 'no' several times. He ignored her, wrapped his arm around her so she could not move and forced his penis into her vagina for around 3 minutes until he ejaculated (one count of rape).

A few days later, she was in bed unwell. He put his hands inside her pyjamas and touched her on the vulva. She said, 'stop', 'no', 'get your hands off me' and 'don't touch me' several times. He continued to touch her.[72] Both offences were committed in breach of the protection order.[73] She contacted the police the next day. He pleaded guilty. He had a 5-year criminal history for other offences from a previous domestic relationship. That included being sentenced for not following the conditions of a domestic violence order in respect of the victim. He had a good work history as a registered nurse but was deregistered due to alcohol dependence. A factor contributing to this was suggested to be his exposure to stress as a nurse. At the time of sentence, he had engaged in counselling for his mental health issues and had taken steps to address his alcohol dependence.

The judge sentenced him to 5 years' imprisonment for the rape offence, suspended after 20 months in prison. The judge referred to general deterrence as being 'an important feature of the sentence' to

> send a message to other men, that if you engage in sexual intercourse without a woman's consent, irrespective of your relationship with her and irrespective of your motivations and irrespective of your claims to love her, that that amounts to rape and will result in condign punishment.[74]

The sentencing judge also referred to the sentence needing to deter him from reoffending and, in an implied way, to the importance of rehabilitation by reference made to the need for him to access courses available in custody to assist him to overcome his issues with alcohol dependence and his mental health issues.[75]

Denunciation was expressed in terms of the requirement that the sentence 'also reflect the community's condemnation of violence committed towards women, sexual violence committed towards woman in the context of a domestic relationship'.[76]

Considered together, this may suggest that the sentencing judge placed slightly more weight than community members on the importance of deterrence, and less emphasis on the need for community protection. However, the need for community protection is addressed through the nature of the sentence itself, being one of 5 years' imprisonment, suspended after the perpetrator had served 20 months with an operational period of 5 years (during which time he would be at risk of having the suspended prison sentence activated). Given the focus of the sentencing judge in their remarks on the need for him to address issues associated with his mental health issues and alcohol dependence while in custody, this

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71 [2023] QDCSR 93.
72 1 count of sexual assault.
73 2 counts of contravention of a domestic violence order.
74 [2023] QDCSR 93, 4.
75 Ibid 4–5.
76 Ibid 4.

also speaks to community protection through rehabilitation. The role of sentencing purposes is discussed in **Chapter 8**.

Community views of offence seriousness

Participants identified that the level of harm experienced by the victim survivor, the circumstances of the offending and the culpability of the perpetrator for the suffering inflicted all contributed to offence seriousness. When considering the seriousness of sexual offences, researchers found participants identified two significant considerations:

1. Long-term psychological harm needs special consideration at sentencing for sexual assault and rape offences.[77]
2. The perpetrator's relationship to the victim survivor is a complex culpability factor in determining seriousness.

Focus group participants regarded the 'cumulative effectives of physical, emotional and psychological harm suffered by victim survivors of rape and sexual assault offences as significant for determining seriousness'.[78] Participants emphasised in discussions the potential for these offences to affect 'every aspect' of a victim survivor's life. Some participants thought the criminal justice system did not adequately consider psychological harm 'due to the difficulty in measuring it, and particularly because the extent of the harm might not be known at the time of sentencing.'[79]

Focus group participants thought the nature of the relationship (or lack of one) between the perpetrator and the victim survivor 'was significant in determining seriousness and had a bearing on the severity of the harm done to the victim-survivor.'[80] Overall, participants concluded that a stranger or unknown perpetrator was more serious than known perpetrators, such as intimate partners or friends. However, this view was tempered by the fact that participants regarded perpetrators who offended against a known victim survivor as being more culpable 'due to the breach of trust that occurred in addition to the sexual offence.'[81] The community 'strongly condemned the use of positions of power and trust as a means of offending, such as power dynamics occurring in familial relationships, teacher-student and employer-employee relationships.'[82] The community saw breaches of trust in familial relationships as the 'most serious' form of offending.[83]

In addition to those findings, participants also identified contextual factors, which increased the seriousness of these offences:

- 'Sexual offences against children are more serious than similar sexual offences against adults.'

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77 The findings were reported across all participants, including victim survivors, which may have impacted these views. See, for example, McNaughton et al (n 39) who report a difference between the views of members of the public who tended to have 'monolith views about the type of harm the offence may have on victims' and focused on the 'immediate details and aftermath' of the offence, rather than on long-term harm. In contrast, victim survivors of sexual offences (including parents/guardians of those aged under 16 years) pointed to both short- and long-term impacts of this offending, as well as secondary effects such as the ability to work or study, to forge new relationships and maintain positive relationships with friends and family: ibid 51–2.

78 *UniSC Final Report* (n 68) 5.

79 Ibid.

80 Ibid.

81 Ibid.

82 Ibid.

83 Ibid.

- 'Non-sexual offences involving potential lethality were ranked more seriously than sexual offences, except for child sexual offences.'
- 'The nature of sexual acts affected how offence seriousness was determined.'[84]

Participants overwhelmingly thought sexual offending against children was more serious than similar sexual offences against adults. Focus group members cited children's 'greater vulnerability, lack of understanding or coping mechanisms, and the longevity of the harm' as the primary reasons why child sexual abuse is more serious.[85] One participant drew attention to the long-term harm, stating 'that child has now been changed forever … All of their trajectory now in life has been f----d because of that one act that person did for their gratification. And that is immeasurable to me.'[86]

Focus group members 'weighed the finality of ending life or potentially ending life, with the lifetime of trauma and ongoing suffering which sexual violence victim survivors experience'.[87] In general, the community considered intentionally killing a person as the most heinous behaviour due to the finality of the harm.[88] Many participants found ranking murder and rape very difficult. For participants who ranked rape as more serious than murder, 'the nature and condition of ongoing trauma or suffering' was assessed 'as being more serious than ending a life'.[89]

Non-sexual offences involving potential lethality (risk of death) (such as grievous bodily harm and strangulation) 'were ranked as approximately equivalent in seriousness as high-level sexual offences' against adults 'such as multiple party rape, while sexual offending against child victim-survivors emerged as more serious than potentially lethal offences'.[90]

The type of penetration (i.e. digital, penile, tongue) and where that penetration occurred (mouth, vulva/vagina, anus) impacted how participants viewed the seriousness of these offences. Participants considered the 'size of the penetrating instrument, the pain associated with the site of penetration, and the potential consequences of penetration (e.g. pregnancy or infection) when determining seriousness'.[91] Generally, community members thought penetration by a penis was more serious than penetration by fingers or an object, while penetration of a person's mouth was viewed as less serious than penetration of a vagina or anus. However, when considering children, participants placed more weight on the harm and culpability factors than on the type of penetration.[92]

The apparent disconnect between the community's assessment of offence seriousness and sentencing practices is explored in **Chapter 7**.

5.4.2 Griffith University's Crime Harm Index

Another approach to gauging community views of offence seriousness is to focus on the perceived harm caused by an offence relative to other offences.

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84 Ibid 6.
85 Ibid.
86 Ibid 31 quoting FG7.
87 Ibid 36.
88 Ibid
89 Ibid.
90 Ibid 6.
91 Ibid.
92 Ibid 38.

The Griffith Crime Harm Index, developed with the support of the Queensland Police Service, measured community members' views of how much harm specific types of offences cause to victims, their families, or the community.[93] As part of our review, the Council requested that the Griffith University Criminology Institute ('GCI') prepare and publish an updated working paper on the development of this Queensland Crime Harm Index.

GCI asked survey participants to rate 33 broad crimes based on the harm that they caused to the community. The focus of the research was on a range of offences, and did not focus on rape or sexual assault in particular.

Participants ranked child sexual abuse just above murder, followed by rape and child physical abuse causing physical injury. Sexual assault other than rape was ranked 8th in terms of seriousness, just above grievous bodily harm and drug trafficking (ranked 9th and 10th respectively), but below domestic violence, terrorism offences and death caused by dangerous driving (ranked 5th, 6th and 7th in terms of harm caused). Burglary, which was included in the UniSC's research discussed above, was ranked 19th in terms of perceived harmfulness.

The findings from the Queensland Crime Harm Survey found that child sexual abuse is ranked as the most harmful crime type, and public nuisance offences as least harmful.

The initial ranking presented mean and median survey results, but this approach does not account for the degree of community consensus on different offence types. Community consensus is an important consideration, as the ranking for some offences may vary based on the age or gender of the survey participant. To address this, the researchers used the survey results to calculate how much the score for the offences varied between groups; this "variance" was then subtracted from the survey results to give a weighted score. When community consensus was considered, the weighted crime harm index resulted in a slight reordering of the rankings, with murder being rated as the most harmful, followed by child sexual abuse. This was due to murder being ranked consistently as a highly serious offence by the participants, but there being some slight variation in how serious the participants ranked child sexual offences as being.

For more information about this research please see **Chapter 4**.

5.4.3 What we can conclude from this research

The two projects discussed above examined Queensland community views on crime harm and the seriousness of these offences. Despite differences in methodology and aims, the results of the two projects were highly consistent.

The two studies are complementary in that the Crime Harm index was a large-scale quantitative survey with 2,000 participants, which has gathered robust rankings on how harmful the public rates a selection of crimes, while the study from UniSC was a qualitative study that offers context on why the public regards certain offences as more serious than others. Due to the differences in aims and methodology the results are not directly comparable; however, the two most relevant findings from the Council's review were consistent across both studies, lending confidence to the conclusions of each.

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93 Janet Ransley and Kristina Murphy, *Working Paper on the Development of the Queensland Crime Harm Index* (March 2024).

In relation to the purposes of sentencing, the UniSC research identified 3 key themes:

- 'Community protection is linked to the perceived dangerousness of a perpetrator.'[94]
- 'Denunciation has value when responding to family and domestic violence.'[95]
- 'Punishment is favoured in circumstances involving a vulnerable victim survivor or where the offending made the community vulnerable.'[96]

The UniSC research suggests the community's view on sentencing purposes is dependent on the circumstances of the individual offence. That is, the views of participants were different when they were asked to consider the importance of sentencing purposes for the offence of rape generally, compared with when they were provided more contextual information about a specific case of rape (or sexual assault).[97] This finding was supported by the literature review, which found that in general the public tends to lean towards punitive measures but becomes less so when given more information.[98]

Both studies highlighted the seriousness of sexual offences committed against children. In both studies, sexual offences against children were viewed as more serious than sexual offences committed against an adult. In their seriousness rankings, the team from UniSC found that the digital rape of a child ranked as the second most serious offence, but the digital rape of an adult was ranked tenth.[99] The GCI study found that child sexual abuse was ranked as the second most serious offence (weighted score mean: 94.48) ahead of the rape of an adult which was ranked third (93.98).[100] The sexual assault of an adult (which was not rape) was ranked sixth.[101]

The UniSC focus groups offered some context regarding why the community may feel this way, with many participants advocating for a harsher punishment for those who committed offences against children due to their inherent vulnerability:

> [Children] are the most vulnerable and they should have the highest levels of protection purely because they don't have any way of helping themselves.[102]

The projects both found that the only offence more serious than child sexual offences was murder.

In the UniSC study, over three-quarters of focus group participants (77%) rated murder as more serious than a sexual offence committed against a child,[103] and 70 per cent rated murder as more serious than a rape of an adult involving multiple perpetrators.[104]

The Queensland Crime Harm index rated murder as the most serious offence (weighted score mean: 94.85) followed by child sexual abuse (weighted score mean: 94.48) and rape (weighted score mean: 93.98).[105]

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94 *UniSC Final Report* (n 68) 20.
95 Ibid 22.
96 Ibid 24.
97 Ibid 17.
98 *Griffith University Literature Review* (n 41) 101.
99 Dominique Moritz, Ashley Pearson and Dale Mitchell, *Community Views of Rape and Sexual Assault Sentencing: Supplementary Materials* (Prepared for the Queensland Sentencing Advisory Council by the Sexual Violence Research and Prevention Unit, University of the Sunshine Coast, June 2024) 66 ('*UniSC Report Supplementary Materials*').
100 Ransley and Murphy (n 93) 37.
101 Ibid.
102 *UniSC Report Supplementary Materials* (n 99) 24.
103 Ibid 39.
104 Ibid 36
105 Ransley and Murphy (n 93) 16.

The UniSC report again offered context regarding why the community may have chosen to rank murder as more serious than child sex offences and other sexual offences. In most cases, the participants highlighted the finality of murder as the reasoning for their ranking. The participants felt that in sexual offences there was hope that the victim survivor could overcome their trauma and live their life, but in murder cases this was clearly not an option, with focus group participants commenting:

> Again, for me, it's with Dustin and Violet [murder scenario], you extinguish all hope. There's nothing left. Where at every other scenario, you hope there's some resilience and you know at least there's hope. But when you get to the point where that person's gone forever, there's no hope at all. I think that's where, for me, that has to be the worst-case scenario.[106]

> I think murder is the most serious crime. I mean, you can't go back from that. The highest level of violence is to take someone's life … well, the person can't come back. She's dead. So, this other person, yes, she was assaulted, raped terribly, but she's still alive.[107]

> Even though I'm feeling very conflicted because I genuinely think there's probably more harm within that [the gang rapes of Veronica]. But I guess, in my moral code I have to honour life. In a view of hope, I guess, for the world, in my head I couldn't devalue someone's life being taken.[108]

The literature review commissioned by the Council was well placed to provide additional support for the conclusions of the UniSC study discussed in section 5.3.2. In 2010, the Bureau of Crime Statistics and Research ('BOCSAR') developed two measures of offence seriousness,[109] which found murder was consistently ranked as the most serious offence; however, while child sexual abuse and aggravated sexual assault were ranked highly on one measure, they were not on the other.[110]

The UniSC study found that the views of victim survivors of sexual offences were not different from those of the general public,[111] which may be supported by the finding in the literature that victim survivors have differing opinions on sentencing, and they do not necessarily advocate for a specific sentence in many cases.[112] For example, researchers found victim survivor perspectives on the purposes of sentencing mirrored general participant responses. However, they also found victim survivors viewed sexual offending responses more strategically and valued primary prevention strategies above secondary prevention strategies.[113] The UniSC study found offences that involved the sexual assault or rape of a stranger were viewed as particularly serious by the community.[114] In a paired comparison, 84 per cent of participants thought rape by a stranger was more serious than rape by the victim survivor's partner.[115] Focus group participants explained this choice:

> I feel like their ability to … deal with the impacts of being sexually assaulted is going to be worse for the stranger victim because now they're going to more likely be hypervigilant or difficulty trusting any new man that they meet or whatever.[116]

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106 *UniSC Report Supplementary Materials* (n 99) 39 The names in the scenarios presented to victims were changed by the researchers see Chapter 4 for the methodology of the USC study.
107 Ibid 36.
108 Ibid. The names in the scenarios presented to victims were changed by the researchers see Chapter 4 for the methodology of the USC study.
109 Median Sentencing Ranking was constructed by identifying the median sentence actually imposed in each Australian Standard Offence Classification (ASOC) group and Median Statutory Maximum Ranking was constructed by reference to the median statutory maximum penalty among offences in each ASOC group.
110 Ian MacKinnell et al. 'Measuring Offence Seriousness' *BOCSAR Crime and Justice Bulletin* (August 2010) 9.
111 *UniSC Final Report* (n 68) 17.
112 *Griffith University Literature Review* (n 41) 87.
113 Ibid 25–7.
114 *UniSC Final Report* (n 68) 44.
115 *UniSC Report Supplementary Materials* (n 99) 27.
116 Ibid.

> For some reason within these scenarios, it came for me as to familiar and unfamiliar. If the perpetrator was familiar to them. For me, husband versus stranger sort of thing was a big part of where I went to. And you feel conflicted because every incident is wrong. But I guess at least if they're a familiar person to them, hopefully the trauma that they experience won't be as severe as a stranger that you've never met.[117]

Some support for this finding was present in the literature review, which found that research participants were more lenient when the victim survivor and perpetrator were known to each other[118] and that public perceptions of sentencing were highly influenced by rape myths.[119]

As discussed in **Chapter 7**, the nature of sexual penetration was relevant to offence seriousness, with participants viewing penile penetration as more serious than other forms of penetration.[120]

However, this view did not apply when the victim survivor was a child,[121] with 88 per cent of participants regarding the digital rape of a child as more serious than the vaginal rape of an adult[122] and almost all participants regarding the digital rape of a child as more serious than the anal rape of an adult (99%).[123] It is important to note that the penile rape of a child was not one of the scenarios presented to the participants for comparison. These findings align with the Crime Harm Index, given child sexual abuse was ranked more highly than rape.

5.5 Consultation views

As discussed in **Chapter 4**, another source of community views on which we have relied in reaching our findings and developing our recommendations is views expressed by stakeholders and community members who participated in our in-person consultation events in Brisbane and Cairns, and at our two online consultation sessions, and who made submissions.

The views of people with lived experience of rape and sexual assault have also provided us with a critical source of information in seeking to better understand the impacts of these offences, victim-survivor experiences of the criminal justice and sentencing process, and views about how the current approach to sentencing might be improved.

In this section, we briefly explore views expressed regarding assessments of offence seriousness, and appropriateness and adequacy of sentencing sexual assault and rape, by participants at our consultation events, as well as in submissions and interviews with victim survivors and support services.

5.5.1 Views on seriousness

Consultation views

At our consultation events, while a diverse range of views existed about current sentencing practices, there was agreement among all participants that rape and sexual assault are both serious forms of offending and sentencing responses should reflect their seriousness.

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117 Ibid.
118 *Griffith University Literature Review* (n 41) 09 citing a study by Brocke, Göldenitz, Holling, and Bilsky.
119 Ibid 102.
120 *UniSC Final Report* (n 68) 44.
121 Ibid.
122 *UniSC Report Supplementary Material* (n 99) 26.
123 Ibid 29.

Many participants referred to the importance of recognising the significant and long-term harm caused by these forms of offending.[124] It was acknowledged that many victims consider that the sentence given is not reflective of the harm they have suffered or the seriousness of these offences.[125] Reflecting the views of many participants representing the views of victim survivors, it was commented that 'the lifelong trauma for victim survivors in contrast to finite sentences for the offender can be hard to rationalise'.[126]

Submission views

Similar views were expressed in submissions, with the Queensland Sexual Assault Network ('QSAN') commenting that 'sexual violence is a more serious crime than people realise', pointing to the 'detrimental impacts across a person's life including their social life, mental health, health in general, relationships, education and financially and alcohol and drug use and wellbeing in general.'[127]

Submissions by victim survivors and support and advocacy stakeholders generally considered that sentences for rape and sexual assault were too low and did not align with community expectations.[128] This was based primarily on the sentence not adequately reflecting the harm caused by sexual violence offences.[129] DVConnect stated that '[t]he intimacy of this crime and the societal norms that surround it make this crime greater than its physical impacts.'[130] QSAN thought sentencing for sexual violence must increase to ensure outcomes 'better reflect community standards and the objective gravity and the moral culpability of the offending.'[131]

There was a strong view that sentencing was not adequate where the victim was a child,[132] with Your Reference Ain't Relevant Campaign stating that 'there is a persistent gap between community expectations and sentencing outcomes for sexual violence offences'.[133] Fighters Against Child Abuse Australia ('FACAA') thought '[n]o victim-survivor will ever feel that there is an adequate sentence for rape' because they are not sentenced near the maximum penalty of life imprisonment, so they were 'nowhere near the public expectation nor are they just, considering the lifelong impact felt by the victim-survivors.'[134]

Legal stakeholders agreed that rape and sexual assault offences involve 'crimes of a very serious nature'.[135] However, they were generally of the view that current sentencing practices provide evidence that the 'seriousness of this type of offending is recognised by sentencing courts' already.[136] As discussed in our Consultation Paper, Legal Aid Queensland ('LAQ') acknowledged that the context and factual circumstances involved in offences of sexual assault and rape vary significantly, as do the personal circumstances of those sentenced for these types of offences.[137]

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124 Online Consultation Event, 3 April 2024.
125 Cairns Consultation Event, 21 March 2024.
126 Brisbane Consultation Event, 11 March 2024.
127 Submission 24 (QSAN) 2.
128 Submission 1 (Name withheld) 1; Submission 14 (Your Reference Ain't Relevant Campaign) 1; Submission 15 (FACAA) 5; Submission 20 (DVConnect) 4; Submission 22 Chapter 1 (TASC Legal and Social Justice) 3–4, 6; Submission 24 (QSAN) 8 –9; Submission 27 (Name withheld) .
129 Submission 15 (FACAA); Submission 20 (DVConnect); Submission 24 (QSAN).
130 Submission 20 (DV Connect) 4.
131 Submission 24 (QSAN) 12.
132 Submission 1 (Name withheld); Submission 14 (Your Reference Ain't Relevant Campaign); Submission 24 (QSAN); Submission 27 (Name withheld).
133 Submission 14 (Your Reference Ain't Relevant Campaign).
134 Submission 15 (FACAA) 5.
135 Submission 28 (ATSILS) 4.
136 Submission 23 (Legal Aid Queensland) 18.
137 Ibid 16.

Consultation with victim survivors

The Council consulted with victim survivors about their views of seriousness.

> Because it's a serious crime (Victim Survivor Interview 1)

When discussing whether she thought the court had understood the harm to her daughter, the mother of a victim survivor told the Council:

> I felt like we were the ones being sentenced, not him…It was quickly mentioned that it has done harm to [my daughter] and her family… [But] not really acknowledging how it has changed our life forever. (Victim Survivor Interview 1 – Parent)

Another victim survivor reflected on whether the court process (including trial) understood the harm she had experienced:

> I feel as though the DPP and the lead detective understood. I felt the defendant's lawyer like didn't give a care at all. Didn't give a f–k basically. Basically, about the trauma I had, they just wanted to win. (Victim Survivor Interview 5)

For many victim survivors, punishment and community protection were the most important sentencing purposes for rape and sexual assault offences, given their seriousness and that offenders should be subject to ongoing supervision:

> I, 100%, think punishment would be the second thing, but I want to protect everyone else who this could happen to because I know how it's affected me, and it can go so much worse in so many different ways. And I'm lucky that – I'm not lucky that this ever happened, but I'm lucky that I got a better way with the way it went down. (Victim Survivor Interview 1 – Parent)

> Punishment, because they should be punished for what they've done. Because as victims, we suffer for the rest of our lives. (Victim Survivor Interview 2)

> Punishment, deterrence and community protection … [community supervision is necessary because] there is a risk of harm to the victim and to other people due to the possibility of reoffending. (Victim Survivor Interview 6)

5.5.2 Views on appropriateness and adequacy

Consultation views

Participants at our consultation events generally agreed that there was 'no simple answer' to assessing whether current sentencing practices are appropriate and adequate. There was a view that sentencing should be individualised and what is 'adequate' will depend on the individual person and circumstances. It is 'case specific'.[138]

Some participants were strongly of the view that current sentencing levels are too low and must increase.[139] Some participants suggested that average sentencing levels being significantly lower than the maximum penalty may contribute to the community's perception that sentences are inadequate.[140]

Procedural justice was seen as just as important a part of the criminal justice response as the sentencing outcome. Some participants considered that how prepared victim survivors are for the sentence and the support they receive, rather than 'the final number/result', might form part of a victim survivor's

138 Online Consultation Forum, 16 April 2024.
139 Cairns Consultation Event, 21 March 2024.
140 Ibid.

assessment of whether a sentence is adequate.[141] Connected to this was the need for a sentence to acknowledge the hurt/pain caused by the offending and for the sentence to deliver punishment as well as deterrence.[142] From a victim survivor perspective, it is important to feel they have been heard and that the sentence imposed by the court reflects that the judge has recognised the lifelong and multiple impacts of the offending.[143]

The type of penalty influenced views about whether a sentence is adequate. Several participants at both the Cairns and Brisbane events thought suspended prison sentences were an inappropriate penalty for these offences. They did not think suspended prison sentences supported rehabilitation, given the lack of supervision conditions attached and the inability of Queensland Corrective Services ('QCS') to compel people on a suspended prison sentences to participate in treatment and other interventions.[144] There was support to extend court-ordered parole to sexual offences and this was viewed as a better alternative than partially suspended prison sentences[145] and probation, enabling QCS to more effectively manage a person's risks.[146]

Submission views

Submission views were similarly varied regarding whether current sentencing practices were adequate, and the ways current practices could be improved. While many victim survivor support and advocacy services submitted, based on their experiences, that sentencing levels should increase, legal stakeholders generally viewed sentencing levels as appropriate, although they identified several improvements that could be made to the range of sentencing and parole options available to a court.

DVConnect told us that victim survivors are of the view that current sentences ‘do not’ ‘adequately denounce the crime’; there was concern that ‘the inappropriateness of the sentencing deters victim/survivors from engaging in the criminal justice system’.[147] A victim survivor submitted to the Council that, '[i]mposing the penalty at the highest level that deters the perpetrators behaviour' should be the priority.[148]

The proportion of the sentence required to be served in custody was another issue pointed to by QSAN as giving rise to victim survivor dissatisfaction, particularly in the context of the existence of the SVO scheme (discussed in **Chapter 11**); it was felt that only a 'fraction of serious violent [offences] are declared.'[149] Where the person receives a custodial sentence but is released shortly following conviction, QSAN told us 'many survivors have reported feeling like this is a betrayal of the courts and that no real sentence was given to the offender'.[150] A submission made by academics from the QUT School of Justice jointly with researchers from the Bravehearts Foundation advised that, based on their research, victim survivors of sexual violence supported perpetrators receiving rehabilitative interventions such as parole supervision and psychological support to address their offending behaviour 'so that they do not harm others', but only if the person 'had already served an appropriate custodial sentence'.[151]

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141 Online Consultation Forum, 16 April 2024.
142 Brisbane Consultation Event, 11 March 2024.
143 Online Consultation Event, 3 April 2024.
144 Brisbane Consultation Event, 11 March 2024; Cairns Consultation Event, 21 March 2024.
145 Ibid.
146 Brisbane Consultation Event, 11 March 2024.
147 Submission 20 (DVConnect) 5.
148 Submission 27 (Name withheld) 1.
149 Submission 24 (QSAN) 9.
150 Preliminary Submission 5 (Queensland Sexual Assault Network) 1.
151 Submission 12 (QUT - School of Justice) 4.

Similar to consultation views, several victim survivors and support and advocacy organisations raised concerns about the use of options such as suspended prison sentences, seeing them as an inappropriate response given the extent of harm caused by these offences. For example, QSAN, noting the increasingly common use of suspended imprisonment orders, advised that it had received feedback from victim survivors that these sentences 'do not adequately reflect the level of fear, the financial cost, the trauma experienced, and the years of counselling and trauma work required to recover from acts of sexual assault and rape and to be able to fully participate in the community'.[152]

In contrast to views that sentences were inadequate, many legal stakeholders and community and legal research and advocacy organisations told us that they generally considered sentences imposed for rape and sexual assault reflected the seriousness of these offences. LAQ thought it would be 'an extremely rare case where an adult offender was sentenced to a suspended prison sentence for penile/vaginal rape, especially where there was not some concurrent supervisory order made'.[153]

LAQ and the Youth Advocacy Centre ('YAC') both emphasised the importance of information to 'better inform courts about an offender and improve the court's ability to impose an appropriate sentence'.[154] Concerns were raised that any increase in penalties might disincentivise guilty pleas, meaning more cases would be taken to trial reducing rates of conviction.[155]

ATSILS was among those that raised concern that 'punitive measures … do not, in isolation, address the root causes of offending' and that '[i]mproving community safety necessitates an approach that also prioritises the rehabilitation of the individual', meaning they will be less likely to reoffend.[156]

Sisters Inside, the Justice Reform Initiative and the Uniting Church in Australia (Queensland Synod) were among those supporting exploration of alternative justice responses to better meet the needs of victim survivors while holding perpetrators to account.[157]

Consultation with victim survivors

The Council consulted with victim survivors about their views of adequacy and appropriateness. Generally, the victim survivors we spoke to thought sentences for sexual assault and rape were not adequate.

When asked whether sentencing of sexual assault and rape was appropriate, victim survivors told the Council:

> No, all sentencing and parole periods are a joke … sexual or child abuse offences should carry a mandatory sentence in prison and longer parole periods. (Victim Survivor (Rape) Interview 6)

> No, I don't think he's serving enough time for what he's done to me. But, I mean, I probably will never accept that any amount of time would be enough. (Victim Survivor (Rape) Interview 2)

For one victim survivor, the non-parole period and future release were of great concern:

> I'm now going to forever be thinking in 10 years' time, he could be walking the street and I will be back to where I was, where I won't be able to just live my life like I do now. (Victim Survivor (Rape) Interview 2)

152 Submission 24 (QSAN) 9.
153 Submission 23 (Legal Aid Queensland) 17.
154 Ibid 21–2; 27–9; Submission 30 (Youth Advocacy Centre) 8.
155 Submission 23 (Legal Aid Queensland) 18.
156 Submission 28 (ATSILS) 4.
157 Submission 13 (Justice Reform Initiative); Submission 16 (Uniting Church in Australia, Queensland Synod); Submission 32 (Sisters Inside Inc).

One survivor compared the impact of court ordered licence disqualification and sentencing for sexual violence in circumstances where the perpetrator had received a wholly suspended prison sentence:

> My neighbour lost his driving licence for speeding and talking on his phone. He lost his licence for 10 months. He had to move. It impacts him being able to take his kid to school. It impacts so many aspects of his life. I feel like he's been more affected than the perpetrator of sexual violence. (Victim Survivor (Sexual Assault) Interview 7)

One mother reflected on the process going through the criminal justice system and how the outcome did not reflect the seriousness of what was done to her daughters:

> But I know that my girls, through that outcome, didn't feel like they had any real justice in any sense. And they were compelled to do, you know, come up with what they wanted to see happen. They had to do all the work, they had to put all these processes in place, and these are teenage girls … and they were put through … and I understand that the court system is very rough, you know, for women to go through for these things. But … this felt very, it was like … it didn't feel like it was a real outcome in any sense of justice for the girls, or him feeling any real consequence or having any real effect on his life, or … to take any seriousness out of what had happened. I guess I'm trying to say that it didn't seem to be taken, you know, the outcome didn't reflect the seriousness of what he had done to those girls. (Victim Survivor Parent (Rape) Interview 3)

Chapter 6 – Courts' assessment of offence seriousness

6.1 Introduction

The Terms of Reference require the Council to 'review sentencing practices' for sexual assault and rape and to advise whether the penalties currently imposed adequately reflect community views about the *seriousness* of this form of offending.[1] This involves a consideration of how 'seriousness' is understood by both the community and courts when imposing a sentence.

In this chapter, we explore the courts' assessment of the circumstances and gravity (seriousness) of rape and sexual assault offending. We analyse how courts currently assess offence seriousness in rape and sexual assault cases in Queensland and in other Australian and international jurisdictions, as well as presenting our own views of offence seriousness.

In presenting our findings, we consider evidence obtained from sentencing remarks and interviews with legal experts, which assisted us to better understand how offence seriousness is determined and assessed.

The Council's key findings on current problems with the approach to assessing offence seriousness are based on our extensive research and consultations.

6.2 Understanding offence seriousness

Offence seriousness is generally viewed as comprising 2 key components:

- the harm caused by the person's conduct or what was intended to be caused or foreseen to be caused by that conduct; and
- the culpability of the person who has committed the offence.[2]

As culpability and/or harm increase, so generally does the seriousness of the offence.

Some factors are aggravating, meaning they increase the seriousness of the offending, because they result in both a higher level of harm and indicate the person sentenced has a higher level of culpability. This is the case, for example, for sexual violence offending where the perpetrator is in a position of trust in relation to the victim survivor or the victim survivor is vulnerable, such as due to their age or disability.[3]

Both aspects of harm and culpability (or 'blameworthiness') are recognised in section 9 of the *Penalties and Sentences Act 1992* (Qld) ('PSA') as important matters to which a court must have regard in

1 Appendix 1, Terms of Reference.
2 Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford University Press, 2005) 144.
3 For more information on what factors increase a person's vulnerability to becoming a victim survivor of sexual violence, see Chapter 2.

sentencing.[4] We explore the principles set out in section 9 of the PSA, and their application to offences of sexual assault and rape are discussed briefly in section 6.3.1 and in more detail in **Chapter 8**.

6.2.1 Harm and wrongfulness

Harm is understood as 'the degree of injury done or risked by the act'.[5] Generally, 'offence seriousness is considered to increase with the level of harm caused' or risked.[6]

In assessing the seriousness of rape and other forms of sexual offending, it is not just the physical or psychological harm caused that makes these offences serious; it is also the *nature* of the wrong done to the victim survivor:[7]

> That most fundamental element of wrongdoing in rape, which differentiates rape from (most) assaults and gives rape a separate theme from the family of assault crimes, is the *sheer use* of the person raped, whether that is how the rapist saw what he was doing or otherwise.[8]

People who commit the offence of rape 'wrong their victims by non-consensual objectification of them'[9] — and the same is true for acts of sexual assault.

As a general rule, the most serious types of harm are considered to be those that involve the violation of a victim's physical integrity, such as death, serious injury and interference with sexual and bodily integrity.

For rape and other types of serious sexual offending, the rights and interests of the victim survivor are significantly impacted. The assessment of offence seriousness and harm is viewed as necessarily linked to the sexual nature of these offences:

> The fundamental interests violated by sexual attacks are autonomy and choice in sexual matters. It is not just that victims are wronged by the invasion of their right to respect for private life, of which sexual autonomy is a central feature. The distinctly sexual element brings in other values and disvalues – self-expression, intimacy, shared relationships; shame, humiliation, exploitation and objectification – which are often crucial to understanding the effects of sexual victimization.[10]

In addition to the immediate physical and mental harm caused by the perpetrator, sexual offences can have very serious consequences for victim survivors. These include mental health impacts (such as depression, post-traumatic stress disorder and suicidality), alcohol and substance misuse, antisocial behaviours, parenting difficulties, sexual revictimisation and sexual dysfunction.[11] When the victim survivor is a child, the harm is likely to be more 'profound and broad-ranging' because of 'the detrimental impacts that trauma can have on the biological, social and psychological development of a child'.[12]

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4 *Penalties and Sentences Act 1992* (Qld) ss 9(2)(c)–(d) ('PSA').
5 Andrew von Hirsch, 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale' (1983) 74(1) *Journal of Criminal Law and Criminology* 209, 214.
6 Victorian Sentencing Advisory Council, *Community Attitudes to Offence Seriousness* (Final Report, 2012) 5.
7 See John Gardner and Stephen Shute, 'The Wrongness of Rape' in Jeremy Horder (ed), *Oxford Essays in Jurisprudence, Fourth Series* (2000).
8 Ibid 32 (emphasis in original).
9 Ibid.
10 Andrew Ashworth, *Sentencing and Criminal Justice* (5th ed, Cambridge University Press, 2010) 134.
11 Victorian Sentencing Advisory Council, *Sentencing of Offenders: Sexual Penetration with a Child Under 12* (Final Report, 2016) 1, citing, Kathleen Kendell-Tackett et al, 'Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies' (1993) 113 *Psychological Bulletin* 164.
12 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report Volume 3: Impacts* (Report, 2017) 11. Child sexual abuse is associated with diagnoses of lifetime major depressive disorder, alcohol use disorder, generalised anxiety disorder and post-traumatic stress disorder ('PTSD'). When compared to people with no experience of

In ranking harms caused by different types of offences and their relative seriousness, various methods have been advocated.[13] One such approach, known as the 'living standards' approach, seeks to rank the harm caused by offences with reference to the effect of the 'typical' case on the living standard of victims.[14]

Applying a 'living standard' approach, rape ranks among the most serious of offences based on harm because it involves violation of 3 out of 4 important interests (humiliation and degrading treatment, the deprivation of privacy and autonomy and threat to physical integrity), with the typical effect on the victim being 'at the level of minimal wellbeing' (the second lowest level of wellbeing just above subsistence).[15]

Sexual assault may be viewed as equally as harmful as rape in some cases, depending on the degree to which relevant interests are violated, or less harmful on the basis of the victim survivor being able to maintain an adequate level of comfort and dignity.

We consider court views of harm and offence seriousness in the following sections of this chapter.

6.2.2 Culpability

Culpability is the other important aspect of assessing offence seriousness. Culpability refers to 'the factors of intent, motive and circumstance that bear on the actor's blameworthiness'[16] and goes beyond a person's legal responsibility for the offending.[17] It impacts the assessment of harm in that '[t]he consequences that should be considered in gauging the harmfulness of an act should be those that can fairly be attributed to the actor's choice'.[18]

As with harm, offence seriousness tends to increase with the increased culpability of an offender.

An intentional act with knowledge of the consequences or likely consequences is generally viewed as more blameworthy than a reckless or negligent one, and there are degrees of culpability within these different categories. For example, a premeditated intentional act is generally viewed as involving a higher level of culpability than an act that is committed on the spur of the moment.

There are also other situational and personal factors that are relevant to this assessment. For example, if the person suffers from a mental illness or intellectual impairment, this can be taken into account in assessing the person's level of culpability.[19] Age is another factor of relevance, as a young person may be less likely to understand the consequences of their actions and to act impulsively.[20]

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maltreatment, those who had experienced childhood sexual abuse were twice as likely to have a severe alcohol disorder, almost twice as likely to have PTSD, around 1.6 times more likely to have generalised anxiety disorder, major depressive disorder or moderate alcohol disorder, and around 1.3 times as likely to have mild alcohol use disorder: 'Child Sexual Abuse', *Australian Institute of Health and Welfare* (web page) <https://www.aihw.gov.au/family-domestic-and-sexual-violence/types-of-violence/child-sexual-abuse#impacts>.

13 For a summary of these different approaches, see Queensland Sentencing Advisory Council, *The '80 per cent Rule': The Serious Violent Offences Scheme in the Penalties and Sentences Act 1992 (Qld) – Final Report: Appendices* (May 2022) Appendix 17, 'Crime Harm Indexes'.

14 This model was developed by Andrew von Hirsch and Nils Jareborg. See Andrew von Hirsch and Nils Jareborg, 'Gauging Criminal Harm: A Living Standard Analysis' (1991) 11 *Oxford Journal of Legal Studies* 1.

15 Ashworth (n 10) 134.

16 von Hirsch (n 5) 214.

17 *R v Yarwood* (2011) 220 A Crim R 497, [34] ('*Yarwood*') citing *R v Verdins* (2007) 16 VR 269 ('*Verdins*').

18 Ashworth (n 10) 134.

19 In Queensland, the relevant principles that apply when sentencing a person with a mental illness are set out in *Yarwood*. (n 17). This case adopts principles set down in the earlier Victorian decisions of *R v Tsiaras* [1996] 1 VR 398 ('*Tsiaras*') and *Verdins* (n 17), commonly referred to as 'the Verdins principles'.

20 Ashworth (n 10) 390; Geraldine Mackenzie and Nigel Stobb, *Principles of Sentencing* (Federation Press, 2010) 81.

Some offences can be viewed very clearly through an escalating scale of culpability; however, rape and sexual assault offences incorporate different levels of culpability within the one offence. For example, rape can involve varying levels of culpability with respect to the perpetrator's awareness of, or thought given to, whether the other person is not consenting or might not be consenting. Despite this, culpability 'will usually be high [for rape] because the offender will know perfectly well what is being done'.[21]

6.3 How Queensland courts determine offence seriousness

6.3.1 Statutory guidance on assessing seriousness

The legislative framework within which offence seriousness is considered highlights the complexity of the criminal law and sentencing. This section briefly considers how both the PSA and the way offences are established in the *Criminal Code* (Qld), guide courts' assessments of seriousness.

For more information on the factors that guide sentencing in these matters, and the Council's recommendations for reform, see **Chapter 8**.

Assessing the nature and seriousness of the offence

Section 9 of the PSA requires a judge to assess the nature and seriousness of the offence when determining an appropriate sentence.[22]

'Harm' is described in section 9 in terms of 'any physical, mental or emotional harm done to the victim'.[23] 'Serious harm' is defined as 'any detrimental effect of a serious nature on a person's emotional, physical or psychological wellbeing, whether temporary or permanent',[24] although this definition applies mainly for the purposes of determining whether a person can be declared convicted of a serious violent offence under the serious violent offences scheme (discussed in **Chapter 11**).[25]

Children aged under 16 in the context of sexual offending are recognised as an inherently vulnerable group by the PSA.[26] For sexual offences committed against children under 16 years, section 9(6) of the PSA directs a court to have primary regard to factors including:

- the effect of the offence on the child;
- the age of the child; and
- the nature of the offence, including, for example, any physical harm or the threat of physical harm to the child or another.[27]

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21 Ashworth (n 10) 134 referencing Sentencing Advisory Panel, *Sexual Offences Act 2003* (UK).
22 PSA (n 4) s 9(2)(c).
23 Ibid s 9(2)(c)(i).
24 Ibid s 4.
25 Ibid s 161B(4). This is one of the criteria than can make a person eligible for a declaration even the offence for which they are being sentenced is not a schedule 1 offence, or (for any offence) if the person is sentenced to less than 5 years' imprisonment. The person must have been convicted on indictment for a court to make a declaration. See further Chapter 11.
26 Ibid ss 9(4)–(7AA).
27 Ibid ss 9(6)(a)–(c).

For offences of violence, including rape, or resulting in physical harm, section 9(3) also requires courts to have regard to, as primary sentencing considerations:

- the personal circumstances of any victim of the offence;
- the circumstances of the offence, including the death of or any injury to a member of the public or any loss or damage resulting from the offence.[28]

Culpability is described in terms of 'the extent to which the offender is to blame for an offence'[29] and 'any damage, injury or loss'[30] they caused (with the latter also relevant to assessing harm).

Statutory aggravating factors

The PSA directs sentencing courts to treat certain factors as 'aggravating', meaning the offence must generally be treated as being more serious.

Statutory aggravating factors include factors relating to the person being sentenced,[31] the offence being a domestic violence offence,[32] a person's prior criminal history (taking into account its nature, relevance and time since the conviction)[33] and the offence having been committed while the victim was at work.[34] In some cases, these do not apply if a court decides it is not reasonable to treat these as aggravating because of the exceptional circumstances involved.[35]

Special factors also apply when sentencing a person for sexual offences against a child under 16 years.[36]

Common law (case law) guidance on aggravating factors is discussed in section 6.3.2.

Maximum penalties are an indication of how seriously Parliament and the community view an offence

The maximum penalty for an offence is another factor to which a court must have regard in sentencing and guides the court's assessment of offence seriousness.[37] The maximum penalty is a representation of Parliament's (and therefore the community's) view of how serious an offence is relative to other offences. The maximum penalty Parliament sets 'is intended for cases falling within the worst category of cases for which the penalty is prescribed'.[38] The High Court has said that

> careful attention to maximum penalties will almost always be required, first because the legislature has legislated for them; secondly, because they invite comparison between the worst possible case and the case before the court at the time; and thirdly, because in that regard they do provide, taken and balanced with all of the other relevant factors, a yardstick.[39]

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28 Ibid ss 9(3)(c)–(d).
29 Ibid s 9(2)(d).
30 Ibid s 9(2)(e).
31 Ibid s 9(2)(g).
32 Ibid s 9(10A). This applies unless the court considers it is not reasonable due to the exceptional circumstances of the case. For the definition of a 'domestic violence offence', see *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)') s 1.
33 PSA (n 4) s 9(10), however the weight given depends on the nature of the previous conviction and its relevance to the current offence and the time elapsed since the conviction.
34 Ibid s 9(10F).
35 Ibid ss 9(10A), (10F).
36 Ibid s 9(6).
37 Ibid
38 *Ibbs v The Queen* (1987) 163 CLR 447, 451–2 ('*Ibbs*').
39 *Markarian v The Queen* (2005) 228 CLR 357, 372 [31] ('*Markarian*').

> Both the nature of the crime and the circumstances of the criminal are considered in determining whether the case is of the worst type.[40]

Rape and aggravated sexual assault charged under section 352(3) of the *Criminal Code* (Qld) carry a maximum penalty of life imprisonment, meaning these offences are viewed as being among the most serious forms of criminal offending. The lower maximum penalties of 10 years for non-aggravated sexual assaults and 14 years for aggravated sexual assaults charged under section 352(2) mean this conduct is still viewed as very serious, but not as serious as rape and other aggravated forms of sexual assault.

6.3.2 Common law guidance on assessing seriousness

In Chapter 7 of the **Consultation Paper: Background**, we presented a comprehensive analysis of key Court of Appeal judgments in sentencing principles in relation to sexual assault and rape offences.

This section provides a brief overview of key themes and issues identified through the review that are particularly relevant to either rape and/or sexual assault offences.

Aggravating factors in case law

Queensland case law has determined several aggravating factors that generally increase the seriousness of sexual violence offending. In no particular order and without being exhaustive, these include:

- victim survivor particularly vulnerable due to age[41] and/or disability;[42]
- offence committed in a public place;[43]
- premeditation or planning;[44]
- offence involved additional use of violence[45] or a weapon;[46]
- abuse of position of trust;[47]
- multiple or successive instances of offending;[48]
- the offence was committed 'in company';[49]

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40 *R v Kilic* (2016) 259 CLR 256 [18] (Bell, Gageler, Keane, Nettle and Gordon JJ) ('*Kilic*').

41 'Rape on an aged and unwell woman': *R v Rosenberger; Ex parte Attorney-General (Qld)* [1994] QCA 488 (Fitzgerald P and Pincus JA and Lee J agreeing).

42 *R v Thompson* [2021] QCA 29, 13 [45] (Williams J and Philippides JA agreeing); *R v CCT* [2021] QCA 278 [241] (Applegarth J, Sofronoff P and McMurdo JA agreeing) ('*CCT*').

43 *R v Basic* (2000) 115 A Crim R ('*Basic*'); *R v Kahu* [2006] QCA 413 ('*Kahu*'); *R v Dowden* [2010] QCA 125; *R v Purcell* [2010] QCA 285; *R v Benjamin* (2012) 224 A Crim R ('*Benjamin*'); *R v Williams; Ex parte Attorney-General* [2014] QCA 326.

44 *R v Griinke* [1992] 1 Qd R 196; *R v AAH & AAG* [2009] QCA ('*AAH & AAG*'); *R v Hussein & Hussein* [2006] QCA 411 ('*Hussein & Hussein*').

45 *R v K* [1993] QCA 425 10 (Davies JA and Thomas J); *Benjamin* (n 43); *R v SDM* [2021] QCA 135, 6 [21] (Mullins JA, Fraser JA and Henry J agreeing) ('*SDM*'); *R v Newman* [2007] QCA 198, 8 [44] (Williams JA and White J agreeing) ('*Newman*').

46 *R v Stirling* [1996] QCA 342. It is a circumstance of aggravation for sexual assault: *Criminal Code* (Qld) s 352(3)(a).

47 *R v WBM* [2020] QCA 107 (Applegarth J with Fraser and Mullins JJA agreeing) ('*WBM*'), citing *R v BBP* [2009] QCA 114 ('*BBP*').

48 *R v Colless* [2010] QCA 26 [17] (Chief Justice, Holmes and Muir JJA) ('*Colless*'); *R v VN* [2023] QCA 220 ('*VN*'); *R v RAC* [2008] QCA 185; *R v KAC* [2010] QCA 39; *R v RBD* [2020] QCA 136; *R v Brown; ex parte Attorney-General* (Qld) [2016] QCA 156; *R v SDR* [2022] QCA 93.

49 *R v AAH & AAG* (n 44); *R v Wano; Ex parte Attorney-General (Qld)* [2018] QCA 117; *R v Hussein & Hussein* (n 44); *R v KU; ex parte Attorney-General (Qld) (No 2)* [2008] QCA 154. It is a circumstance of aggravation for sexual assault: *Criminal Code* (Qld) s 352(3)(a).

- more than one victim survivor;
- location and/or or context of the offence – for example, committed in the context of a burglary;[50]
- victim survivor became pregnant to, and/or had a baby fathered by the offender;[51] and
- risk of and actual transmission of disease.[52]

Victim survivor vulnerability is an important consideration

The circumstances of the victim survivor are very important in determining the seriousness of any offence. This includes consideration of the victim's vulnerability. The Court of Appeal has recognised that sexual violence offending against vulnerable victim survivors is particularly serious, which can elevate the seriousness of the offending. This is because it may increase the harm caused to the victim survivor and the perpetrator's culpability because they targeted a vulnerable person.

A victim survivor may be vulnerable for a range of reasons, including due to their personal circumstances and/or the situation they are in during the course of the offending. Some cohorts are vulnerable due to their higher risk of experiencing sexual violence (without being exhaustive):

- women;[53]
- children;[54]
- Aboriginal or Torres Strait Islander peoples;[55]
- a person with a disability;[56]
- a person from a culturally or linguistically diverse background;[57]
- a person who is asleep or unconscious when the offending occurs.[58]

These considerations apply to both sexual assault and rape offences.

The next section examines Court of Appeal commentary on particular issues identified in this review for sexual assault and rape.

Rape offence case law

All forms of penetration are serious

Rape is defined to involve different types of penetration without consent and the same maximum penalty applies regardless of penetration type.[59]

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50 For example, an offence committed during a burglary, see *R v Ponting* [2022] QCA 83; *R v Gesler* [2016] QCA 311. For example, victim survivor is taken to an isolated place, see *AAH & AAG* (n 44); *R v Hussein & Hussein* (n 44).

51 *R v MBY* [2014] QCA 17, [75] (Morrison JA, Muir JA and Daubney J agreeing) ('*MBY*'); *DPP (Vic) v Dalgliesh (a Pseudonym)* (2017) 262 CLR 428, 436 [20], 438 [26], 443 [36] (Kiefel CL, Bell and Keane JJ) ('*Dalgliesh*').

52 *R v Heckendorf* [2017] QCA 59, [31] (McMurdo JA) (Fraser JA, Mullins J agreeing) ('*Heckendorf*'); *R v Robinson* [2007] QCA 349 [29] ('*Robinson*'); *R v Porter* [2008] QCA 203 [29]; *R v Lawrence* [2002] QCA 526, 16 (McMurdo P, Helman and Philippides JJ agreeing).

53 See, eg, *R v Daniel [1998] 1 Qd R 499,* 515–16 ('*Daniel*').

54 See Ibid; *CCT* (n 42) [241] (Applegarth J, Sofronoff P and McMurdo JA agreeing). *R v NAF* [2023] QCA 197 [31] (Boddice JA, Mullins P and Cooper J agreeing).

55 See, eg, *Daniel* (n 53) 512.

56 See *R v Libl; Ex parte A-G (Qld)* [1996] QCA 63, 6 (Fitzgerald P, McPherson JA and Helman J); *R v Cutts* [2005] QCA 30 [22] (McMurdo P) ('*Cutts*').

57 See *R v VN* [2023] QCA 220 17 [30] (Bowskill CJ and Morrison and Dalton JJA).

58 See *R v Enright* [2023] QCA 89 [90]–[91] ('*Enright*').

59 *Criminal Code* s 349; *R v Smith* [2020] QCA 23 [37] (Morrison J) ('*Smith*').

In the 1987 decision of *Ibbs v The Queen,*[60] the High Court recognised that the offence of sexual assault (rape)[61] could involve a 'spectrum' of seriousness, and the seriousness or 'the heinousness of conduct in a particular case depends not on the statute defining the offence but on the facts of the case'.[62] It also said that 'a sentencing judge has to consider where the facts of the particular case lie in a spectrum at one end of which lies the worst type of sexual assault perpetrated by *any* act which constitutes sexual penetration as defined'.[63] In other words, the seriousness of a particular example of rape or sexual assault must depend on an assessment of all the facts and circumstances involved in the case.

In 2003, the Court of Appeal considered the digital-vaginal rape of a 5-year-old child in *R v D.*[64] President McMurdo observed that while pregnancy was not a risk given the age of the child, penile penetration would be 'expected to cause even more serious injury than those here', and therefore digital-vaginal rape was 'less serious than if the offence of rape had involved penile penetration'.[65] The 12-year sentence was reduced to 10 years to reflect this. In contrast, in 2005, the Court of Appeal determined a sentence of 3 years' imprisonment was within 'the permissible range' for digital-vaginal rape of an adult woman.[66]

The 2008 *decision of R v Wark*[67] ('*Wark*') is the authority for the statement that penile-vaginal or anal penetration will often be treated as more serious than digital penetration, with McMurdo P further stating:

> [E]ach case will turn on its own circumstances. Relevant exacerbating factors include whether the complainant is a child and if so, the age of the child; whether violence has been used; the physical and psychological effect of the offence on the victim; and whether the offender has previous relevant history.[68]

Cullinane J, while accepting 'as a general proposition that rape constituted by penile-vaginal or anal penetration will attract a higher sentence than rape cases involving digital or oral penetration', at the same time expressed a view that previous cases did not support 'the proposition that there is a rigid compartmentalisation of rape offences into these two categories'.[69] His Honour noted: '[i]n all cases it is the particular circumstances which will determine the level of criminality and together with other factors the sentence to be imposed', and there may be cases of non-penile penetration 'which because of their associated circumstances call for punishment which may be as great as or exceed cases involving penile penetration'.[70] His Honour further stated, 'the facts of the particular case and the overall criminality must always govern the seriousness of the offence'.[71]

In the 2010 decision of *R v Colless*[72] ('*Colless*'), the Court of Appeal stated:

> While the *Criminal Code* establishes the same maximum penalty, whether the rape be accomplished by penetration by the penis or digitally, it is reasonable to observe that without additional aggravating factors (weapons, extra brutality, threats of serious harm, premeditation, residual injury etc), a rape accomplished digitally may *generally* be

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60 *Ibbs* (n 38) 451–2 [4] (Mason CJ, Wilson, Brennan, Toohey and Gaudron JJ) (emphasis added).
61 These comments were made with respect to the former section 324F of the *Criminal Code* (WA) (repealed) which described non-consensual penetrative acts as 'sexual assault'.
62 *Ibbs* (n 38) 452.
63 Ibid (emphasis added).
64 [2003] QCA 88 (McMurdo P, Mackenzie and Philippides JJ). This followed reforms which meant this conduct was now included within the offence of rape rather than indecent dealing with a child which then carried a 10-year maximum penalty.
65 Ibid, 7–8.
66 *R v TM* [2005] QCA 130, [36] (Cullinane J, Jerrard JA and Jones J agreeing).
67 [2008] QCA 172 ('*Wark*').
68 Ibid [2] (McMurdo P).
69 Ibid [37] (Cullinane J).
70 Ibid [36]–[36] (Cullinane J). See also Mackenzie AJA at [13].
71 Ibid [13] (Mackenzie AJA).
72 (n 48).

> seen as somewhat less grave than a rape accomplished by penile penetration. That is because it may be less invasive, would not carry a risk of pregnancy and would ordinarily carry a substantially reduced risk of infection.[73]

In a 2012 appeal decision, Justice Fryberg was of the view that 'penile rape effected in the mouth of the victim may generally be seen as somewhat more grave than vaginal rape, particularly where there is ejaculation in the mouth or throat'.[74] Gotterson JA, referring to Fryberg J's remarks, refrained from 'expressing any view on the comparative gravity of different types of penile rape'.[75]

The Court in 2014 accepted that 'as a general proposition … penile rape is more culpable than, for example, digital rape'. [76] This was due to digital rape not carrying 'the same risk of disease or pregnancy' and on the basis it does not 'generally, give rise to as great a sense of violation on the part of the victim'.[77]

In 2020, Morrison JA commented on comments made in *Colless* that the Court of Appeal was not attempting to 'lay down an overriding principle' that 'digital rape may be expected to be less severe than other forms of rape'.[78] His Honour endorsed Cullinane J's remarks in *Wark,* that as a 'general proposition', penile-vaginal rapes and penile-anal rapes 'will attract a higher sentence than digital rape or oral rape'.[79]

The 2023 decision of *R v Wallace*[80] reaffirmed remarks made in *Wark* as to 'comparisons between penile rapes and other types of rape'.[81] Chief Justice Bowskill endorsed 'the need to consider the particular circumstances of each case rather than … generalisations as to what kind of rape is worse or more serious'.[82] However, the Court said later in 2023, that a person sentenced for 'the rape of a child under the age of 12 years based on digital penetration of the vagina with limited additional violence' will be at 'the lower end of the possible sentences for the offence of rape'.[83]

The Court of Appeal has agreed rape conduct involving a fist forced into a victim's vagina or anus (referred to commonly as the act of 'fisting') is 'distinct from what might be called the usual cases of digital rape, referred to in *Colless*, which only involve one or two fingers'.[84] In *R v Clarke*,[85] the appellate inserted his entire fist with force into the victim's vagina while she was saying no, struggling and screaming in pain. The Court did not see 'any reasonable basis to differentiate this rape, in terms of the sentence at least, from penile rape', noting the absence of risk from pregnancy or infection.[86] The Court has said that such an act can involve conduct that is 'brutal', 'degrading' and 'injurious'.[87] In *R v Kellett*,[88] Morrison J concluded that the penetration of the complainant's vagina by 'fisting', resulting in grievous bodily harm, 'was violent, brutal, degrading and callous'[89] and was an 'act designed to humiliate and degrade'.[90]

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73 Ibid [17] (de Jersey CJ, Holmes and Muir JJA) (emphasis added).
74 *R v GAP* [2012] QCA 193 33–4 [138] ('*GAP*').
75 Ibid 17 [83].
76 *R v CBL; R v BCT* [2014] QC A 93 [105] (Muir J, Gotterson JA and Douglas J agreeing) referring to *R v MBG & MBH* [2009] 252.
77 Ibid.
78 *Smith* (n 59) [35]–[36].
79 Ibid [37].
80 *R v Wallace* [2023] QCA 22 ('*Wallace*').
81 Ibid [44] (Dalton J).
82 Ibid [13] (Bowskill CJ). See also *R v RBG* [2022] QCA 143 [4] (Dalton JA) ('*RBG*') citing *Smith* (n 59) [34]–[37] (Morrison J).
83 *R v Misi; Ex parte A-G (Qld)* [2023] QCA 34, [28].
84 *R v Clark* [2017] QCA 226 [152].
85 Ibid.
86 Ibid [152]. See also *SDM* (n 45).
87 *R v Kellett* [2020] QCA 199 [103] (Morrison JA).
88 Ibid.
89 Ibid [113].
90 Ibid [103].

Child sexual offences are to be treated as more serious

In 2003, the Queensland Parliament introduced several reforms addressing child sexual violence, which included the introduction of special sentencing considerations for child sexual offences and that such offences are to be 'recognised as offences equating in seriousness to offences of violence'.[91]

In 2010, the Queensland Parliament made further amendments to the PSA, enacting what is now section 9(4)(b) [that in sentencing a person for a sexual offence against a child under 16 years, the person must serve actual imprisonment unless there are exceptional circumstances] and section 9(5). The Explanatory Notes noted that the Bill,

> [by] strengthening the penalties imposed upon child sexual offenders complements the existing legislative measures aimed at the protection of our most vulnerable members of the community; recognises the inherent seriousness of any form of indecent treatment upon a child; reflects the lasting and potentially devasting impact this conduct may have upon a young victim; and ensures that the need for general deterrence, punishment and reflection of the community's condemnation of the conduct are at the forefront when passing sentence.[92]

The Court of Appeal has commented that the impact of those reforms 'are reflected also in the increasing understanding of and recognition by courts in more recent decades, of the profoundly damaging impact of sexual offences on child victims'.[93] The Court also said those reforms had 'also been reflected in increasing sentences'.[94]

The Court has further noted in relation to the impact of sexual offences against children:

> While the wider public may not have been aware until recent times about the persistent corrosive effective upon the lives of [sexual violence victims], those in the legal profession, in law enforcement and in some medical fields have long known that even a single sexual offence against a child may have terrible and enduring consequences.[95]

In 2019, the Court of Appeal said in *R v O'Sullivan; Ex parte Attorney-General (Qld)*:[96]

> The sequence of legislative changes since 1997 puts it beyond question that the legislature has made a judgment about the community's attitude towards violent offences committed against children in domestic settings. The amendments constitute legislative instructions to judges to give greater weight than previously given to the aggravating effect upon a sentence that an offence was one that involved infliction of violence on a child and that the offender committed the offence within the home environment.[97]

While those remarks were made in relation to offences involving the unlawful killing of a child, they are applicable to all forms of violence offences committed against children. The Court also affirmed the High Court decision of *R v Kilic*[98] ('*Kilic*') and the need for sentencing practices for 'sexual offences' to depart from past practices 'by reason, inter alia, of changes in understanding about the long-term harm done to victims'.[99] Referring to those remarks, the Court expressly said, 'being sensitive to the community's attitude about a particular kind of offence is part of the exercise of judicial discretion'.[100]

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91 Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 7.
92 Explanatory Notes, Penalties and Sentences (Sentencing Advisory Council) Amendment Bill 2010 (Qld) 2.
93 *R v Free; Ex parte A-G* (2020) 4 QR 80, 103 [69] ('*Free*'), referring to *Franklin v The Queen* [2019] NSWCCA 325, [126]–[127], referring to *R v Gavel* (2014) 239 A Crim R 469, 483 [110]; *R v Cattell* (2019) 280 A Crim R 502, 521–22 [109]–[111]; *Dalgliesh* (n 51) 447 [56]–[57].
94 *Free* (n 93) [69].
95 *R v RAZ; Ex parte A-G (Qld)* [2018] QCA 178, 5 [23] (Sofronoff P, Gotterson JA and Boddice J agreeing) ('*RAZ*').
96 *R v O'Sullivan; Ex parte A-G (Qld)* (2019) 3 QR 196 ('*O'Sullivan*').
97 Ibid 231 [93].
98 (n 40) [21] (Bell J, Gageler J, Keane J, Nettle J and Gordon J).
99 *O'Sullivan* (n 96) 234 [103].
100 Ibid [103].

In 2020, the Court of Appeal reaffirmed in *R v Stable (a pseudonym)*[101] ('*Stable*') that the 2003 child sexual offence reforms, noting the special sentencing considerations,[102]

> constituted a legislative command to sentencing judges and signify the legislature's opinion that, henceforth, offences of a sexual nature against children were to be regarded with greater seriousness than previously.[103]
>
> The [2003] amendments have brought the circumstances of the victim and other potential victims to the forefront of a sentencing judge's consideration. These are matters that address the community's denunciation of sexual offences against children. These provisions constituted a legislative representation about the community's attitude to sexual offences against children, particularly against very young children.[104]

The Court also referred to the 2016 case of *Kilic,* stating:

> Community attitudes change and the amendments made in 2003 reflected such changes. The amendments have brought the circumstances of the victim and other potential victims to the forefront of a sentencing judge's consideration. These are matters that address the community's denunciation of sexual offences against children. These provisions constituted a legislative representation about the community's attitude to sexual offences against children, particularly against very young children. The amendments made these matters the starting points for the judicial task. Statute law, having the higher authority of the legislature, cannot be waived by the parties simply because they are ignorant of it or because they choose not to argue it although it is applicable.[105]

Relationship and context between victim survivor and perpetrator

The Court of Appeal has identified that the relationship and context between the victim survivor and perpetrator is important to the determination of offence seriousness. Depending on the circumstances, the type of relationship or absence of any, may increase the harm caused to the victim survivor and/or the culpability of the perpetrator.

Historically, rape committed by a stranger appears to have been regarded more seriously than rape committed by a person known to the victim. This is inferred from the Court of Appeal's observation that rape of a stranger in a public place, without additional physical violence or a relevant criminal history, warrants a sentence in the range of 7 to 10 years' imprisonment.[106]

In 2014, McMeekin J stated that while stranger rapes are an 'aggravating feature', 'sometimes the fact that the parties are known to each other can itself be an aggravating one' and in doing so referred to a Victorian appeal decision:[107]

> In particular, it might be said that his Honour purported to apply any principle to the effect that rape by a man of his wife or former wife or of a person with whom he is or has been in a close relationship is to be treated more leniently than a rape by a stranger. The authorities do not appear to support any such principle. The most that can be said, in my opinion, is that the penalty imposed for the crime of rape cannot be regarded as necessarily conditioned by the relationship of the parties to it. Any relationship or lack of it between them will no doubt usually fall to be considered as one of the circumstances to be taken into account in a determination of the appropriate penalty. In some circumstances, a prior relationship may serve as a factor of mitigation, but it need not, and it may indeed serve to aggravate the offence.[108]

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101 [2020] QCA 270 ('*Stable*').
102 PSA (n 4) ss 9(4), 9(6).
103 *Stable (*n 101), 13 [33] (Sofronoff P, and Fraser and Philippides JJA agreeing).
104 Ibid.
105 Ibid 15 [45].
106 *Kahu* (n 43) [24] referring to *Basic* (n 43) [25].
107 *R v Williams; Ex parte A-G (Qld)* [2014] QCA 346 [109] (McMeekin J, Henry J agreeing)
108 Ibid [109] citing *R v Harris* [1998] VR 21 at 28 referred to with approval by Winneke P in *R v Mason* [2001] VSCA 62 [8] ('*Mason*').

Since 2016, the courts have been required to treat the fact that an offence is also a domestic violence as aggravating (unless there are exceptional circumstances) by virtue of section 9(10A) of the PSA. It is a factor that a sentencing judge may take into account in imposing a more severe sentence than might be imposed in the absence of that factor'.[109] The Court has affirmed that cases sentenced prior to the introduction of section 9(10A) 'would now not reflect an appropriate sentence for that type of offending with the aggravating factor of being a domestic violence offence'.[110]

The operation of section 9(10A) and its effect on sentencing was discussed by the Court of Appeal in the 2018 decision of *R v McConnell*:

> [S]ubsection 10A of section 9 of the *Penalties and Sentences Act 1992* (Qld) … provides that, '[i]n determining the appropriate sentence for an offender convicted of a domestic violence offence, the court must treat the fact that it is a domestic violence offence as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case.' … As Mullins J observed in *R v Hutchinson*, this provision is likely over time to have an effect on the sentencing of offenders convicted of offences that are domestic violence offences, but the effect in a particular case will depend on balancing all of the relevant factors relating to the offending and the offender.[111]

Subsequent appeal decisions suggest the aggravating factor has been applied in support of sentences that in some instances exceed those imposed for 'stranger' rape – however, noting important differences going both to matters of harm and culpability.

For example, in *R v VN*[112] (*'VN'*), the applicant was sentenced to 12 years' imprisonment (with an automatic serious violent offence declaration, meaning he would have to serve 80 per cent of the sentence before being eligible for parole) after being convicted following a trial for 3 counts of rape alongside other offences committed against the daughter of a woman he was in an intimate relationship with. The complainant was aged 17 at the time of the first rape with the offences committed over a period of months. The applicant referred to several cases including *R v Benjamin*[113] and *R v Heckendorf*[114] to argue 12 years was manifestly excessive.[115] Both cases involved penile-vaginal rape and additional physical violence to subdue the victim. The Court of Appeal disagreed with that argument, dismissing the appeal, noting that while the circumstances of each case varied, the consequences for the complainant, the Court found, 'cannot be said to be less serious or severe'[116] with the Court noting in this case:

> She was a young, vulnerable 17 year old when she was first raped, in her home, by a man in the position of de facto head of her family. Her education was affected because she dropped out of school. Her brother moved out of the family home. Her relationship with her mother must have been damaged and confused. She lived for months with the trauma and burden of having her rapist live in the same house, not knowing when he might rape again, and with the threat of destruction of her reputation, a matter of particular significance given her cultural background [as a Tamil who had come to Australia from Sri Lanka]. She was robbed of the opportunity to develop as a sexual being in her own time and on her own terms.[117]

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109 *O'Sullivan* (n 96), 230 [91].
110 *SDM* (n 45) [37] referring to *R v Pickup* [2008] QCA 350.
111 *R v McConnell [2018] QCA 107* [17] (Fraser JA) (citations omitted).
112 *VN* (n 48*).*
113 *R v Benjamin* (n 43).
114 *R v Heckendorf* [2017] QCA 59.
115 Ibid.
116 Ibid.
117 Ibid [32].

Other cases of rape involving older adult ex-intimate partners also support the view that the treatment of 'relationship' rapes as less serious than those committed in other contexts given the operation of section 9(10A) should no longer apply.[118]

In March 2024 in the District Court, an offender was sentenced for rape (MSO), as well as several non-sexual violence offences (all were domestic violence offences). Additional offences included common assault, assault occasioning bodily harm (simpliciter and aggravated) and strangulation, some being a precursor to the rape. The judge referred to the Court of Appeal having indicated potential ranges for rape in the context of a relationship and stated the Crown and defence had accepted the applicable range for this type of case was 8–10 years, subject to aggravating and mitigating circumstances.[119]

The Council will be further exploring how the aggravating factor under section 9(10A) is being applied in sentencing more generally, during the next stage of our review in response to the Terms of Reference regarding domestic and family violence.

Use of additional violence

By its very nature, the act of rape is inherently violent. However, the use of additional 'gratuitous' violence in the commission of the offence is generally viewed as increasing seriousness. As noted above, the PSA expressly requires courts to treat 'the nature or extent of the violence used, or intended to be used, in the commission of the offence' as being a primary sentencing consideration when sentencing for offences that involved the use of violence against another person.[120]

Rape cases that have involved additional violence are generally viewed as more particularly serious examples of the offence, and the Court of Appeal has observed that authorities 'tend to distinguish between cases of rape which involve and do not involve substantial [accompanying] violence'.[121] A review of appellate decisions found in several cases that the use of additional violence was the decisive feature in cases resulting in a sentence of 10 years or more being imposed.[122] For example, the Court has said 'cases where rape and grievous bodily harm are involved, on a plea of guilty, the sentencing range is 10 to 14 years' imprisonment'.[123] However there are inconsistencies.

In *R v Kellett*,[124] the perpetrator forced his entire fist into the victim's vagina, resulting in a grievous bodily injury and had immediate medical treatment not been sought, the victim would have died from the injuries. Kellett was found guilty by a jury and sentenced to 7 years with an SVO. This was not disturbed on appeal.

There appears to have been a shift recently, with the Court of Appeal cautioning practitioners about focusing on physical harm alone. For example, in the 2020 decision of *R v WBM,*[125] the Court noted the

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118 See, for example, *R v FBC* [2023] QCA 74 (in which an appeal against a 9-year sentence with parole eligibility after 6 years on a plea of guilty was dismissed); *R v BEA* [2023] QCA 78 (in which in a case involving a conviction for 18 offences, including 13 rapes, committed over a period of about 3 years following a trial, with the highest sentence imposed being a sentence of 11 years' imprisonment for 2 of the rape counts was dismissed); and *R v NT* [2018] QCA 106 (in which a 9-year sentence for rape sentenced alongside other serious offences, including two counts of torture, was found not to be manifestly excessive, even taking into account the offender had spent 17 months in pre-sentence custody which could not be declared as time served under the sentence).

119 *R v [Deidentified]* QDC [2024] (7394 of 2023).

120 PSA (n 4) s 9(3)(e).

121 *R v Tory* [2022] QCA 276 [38] (Kelly J, McMurdo and Dalton JJA agreeing) ('*Tory*').

122 See *R v Buchanan* [2016] QCA 33 ('*Buchanan*'); *Benjamin*. (n 43).

123 *Wallace* (n 80) [17] (Bowskill CJ, Bond JA agreeing) citing *R v Newman* [2007] QCA 198 [54] (Jerrard JA) ('*Newman*').

124 *R v Kellett* [2020] QCA 199.

125 *R v WBM* [2020] QCA 107.

reactions of both child and adult rape complainants may mean that the use of additional significant physical violence by the perpetrator is not required:

> When a father prevails upon a seven year old to have sex with him, a high level of physical violence may not be required. It was not required in this case. The physical violence sometimes required to overcome the physical resistance of an adult victim is not required. Some adult victims of sexual assault are immobilised by fear and a sense of powerlessness. The absence of strong physical resistance from a seven year old daughter is unsurprising. Therefore, the absence of a high level of physical violence by the applicant is also unsurprising.[126]

In the 2022 decision of *R v Smith,*[127] involving an adult victim survivor, the Court found that 'none of these [factors] advances' an applicant's argument that his sentence was manifestly excessive:

> (a) there was no use of a weapon or threat of a weapon;
>
> (b) there were no threats of harm to [the victim];
>
> (c) there was no deprivation of liberty nor physical attack;
>
> (d) there was no sodomy; and
>
> (e) there were no threats to silence [the victim] if she screamed, and no covering of the mouth.[128]

And, in the 2023 decision of *VN*, the Court cautioned against focusing on physical harm as this may minimise the weight that should be placed on other harms experienced by victim survivors, saying:

> Previous decisions of this Court have referred to an appropriate 'range' of 10 to 14 years' imprisonment for violent rape where the offender is entitled to the benefit of a plea of guilty. The effect of these decisions is to regard physical injury and harm as an aggravating feature, rendering the offence more serious in those cases, than in cases where physical harm is not caused. The tendency to use physical injury and harm as a tool for comparison of sentences seems to have developed in cases where the rape or rapes occurred on one violent occasion. By contrast, here the rapes and other violence occurred over a prolonged period of time and involving … non-physical harm … It is hard to see how it could be said the psychological harm caused to a complainant such as in the present case can be said to be any less significant. … To diminish the harm caused by serious sexual offending of the kind the applicant committed by contrasting it with physical harm is to misunderstand the real impact of offending of this kind.[129]

Recently, in *R v CDF*,[130] Bond JA said, 'the penile/vaginal rape of a pre-pubescent girl by a mature man is an intrinsically violent act'.[131] He went on to say, 'the applicant's argument that there was no accompanying or additional violence merely amounts to an identification of the absence of what would have been an aggravating factor'.[132]

These cases suggest the Court of Appeal is encouraging legal practitioners and sentencing courts to adopt a more nuanced understanding of assessments of both harm and culpability rather than making assumptions that offences involving the use of additional violence (usually involving older adult victims) are, by their very character, more 'serious' and 'harmful' due to this feature.

Where a sexual act results in 'extreme violence' on a very young child 'for the purpose of seeking revenge on the mother' and resulting in 'serious injuries to the child', the Court has said 'in those circumstances it

126 Ibid [31] (Applegarth J, Fraser and Mullins JJA agreeing).
127 *R v Smith* [2022] QCA 55.
128 Ibid [56]–[57] (Morrison JA, Fraser and Bond JJA agreeing).
129 *VN* (n 48) [32].
130 *R v CDF* [2024] QCA 207.
131 Ibid [35] (Bond JA, Brown JA and Kelly J agreeing).
132 Ibid.

matters little whether the weapon used was a penis, a finger or fingers or some other object' when assessing the conduct.[133]

As discussed in section 6.4.6, the use of additional violence is often not necessary where offences against vulnerable victim survivors, including children and people with an intellectual disability, are concerned, although these offences result in significant emotional and psychological harm (and, in some cases, physical injury). Further, the fact the offender targeted a vulnerable victim survivor while knowing the likely impacts on the victim of their behaviour means they have a high level of culpability even where no additional violence was used.

Sexual assault offences

There is a wide range of conduct captured within the offence

Sexual assault involves a wide range of conduct with both simpliciter and aggravated tiers of the offence. Generally, offences under clothing involving skin-on-skin contact are viewed as more serious forms of non-aggravated indecent assaults than 'over clothing' offences, although the existence of aggravating factors can increase the seriousness of the case.[134]

For example, in *R v Abdullah*,[135] on separate occasions the applicant indecently touched 2 women he did not know on their breasts, bottom, thighs and back, as well as kissing, or attempting to kiss, their cheeks. In dismissing the appeal, Bowskill CJ referred to 'the physical invasion of the sexual assaults perpetrated by the applicant' as being 'objectively less serious than those which involve assaults under a complainant's clothes and underwear'. [136] However, there were a number of aggravating features that increased the seriousness of this case:

- The complainants were both much younger than the applicant.
- He was a stranger to them.
- The offending was of a predatory nature (the applicant having come to their homes in his capacity as a tow-truck driver, in the first case unannounced, and in the second in response to the planned sale of a car).
- There were two complainants.
- The second offence was committed after the applicant had been arrested, charged and released on bail for the first.[137]

In *R v Downs*[138] – a case involving 10 counts of sexual assault and 4 counts of common assault committed against 8 girls aged between 15 and 17 years working at a pizza store where the applicant was the manager – the Court of Appeal commented:

> [T]he distinction sought to be made [that there were no instances of touching underneath clothing – which was found to be not correct] is hard to understand. The applicant touched the breasts of complainant B (squeezing them and touching them on the sides), complainant E (grazing her breasts), complainant F (resting his hand on the side of her

133 *R v TK* [2004] QCA 394 [29].
134 *R v Kane; Ex parte A-G (Qld)* [2022] QCA 242 ('*Kane*'). Aggravating factors include: targeting a woman in a public place, removing her to a secluded area, overcoming her resistance and protests and not desisting until a passer-by approached: [27] (Mullins P, Dalton JA, Flanagan JA).
135 [2023] QCA 189 ('*Abdullah*').
136 Ibid [44] (Bowskill CJ, Flanagan JA and Buss AJA agreeing).
137 Ibid [2], [44].
138 [2023] QCA 223.

> breast, and grazing both breasts), and complainant G (slowly and deliberately brushing her breasts). In the circumstances that the conduct took place at the complainant's place of work and the applicant was their manager, the under-clothing significance is difficult to see.[139]

Relationship between victim survivor and perpetrator, breach of trust and victim age

The Court of Appeal has found sexual assaults committed by a stranger are an aggravating factor.[140]

The element of abuse of trust also has long been identified as a factor that makes an offence more serious; however, even noting this, the Court of Appeal has commented generally on the limited utility of cases decided prior to the introduction of section 9(10A) as comparable sentencing decisions.[141]

In the 2018 case of *R v SDF,*[142] the Court of Appeal noted that the utility of some comparable sentences was limited, having been decided prior to the enactment of section 9(10A).[143] The Court of Appeal found it was 'not a misuse of language [by the sentencing judge] … to describe the applicant's opportunistic conduct of using the complainant [his granddaughter] for his own sexual pleasure as a serious breach of trust and deliberate and predatory conduct'.[144]

Factors such as the context of the offending, use of additional violence and engaging in degrading acts also make these offences more serious. For example, in *R v HCH*,[145] Davis J remarked:

> The maximum penalty for [non-aggravated] sexual assault is 10 years. That offence by itself, must in my view, attract at least five years imprisonment … Section 9(10A) mandates that a court must treat the fact that an offence is a domestic violence offence as an aggravating factor in the absence of exceptional circumstances … Section 9(10A) effectively mandates that considerations such as denunciation and deterrence should have greater weight than they might otherwise … Here all the offending was serious and was conducted over a protracted period. The offending was committed in a domestic setting upon the applicant's domestic partner and on some occasions, in the presence of children. The offending was demeaning and degrading to the complainant and has caused her ongoing harm. The offending reflected in the second indictment [the sexual assault] was particularly serious and obviously designed to humiliate the complainant.

As for rape, the fact the victim was under 18 years of age is a relevant consideration for sexual assault,[146] — although, in contrast to rape, indecent assaults against children aged under 16 years are more commonly charged as indecent treatment of a child rather than under the broader section 352 offence of 'sexual assault'.

6.3.3 Personal mitigating factors and seriousness

Personal mitigating factors are relevant in determining sentence, but do not reduce the *objective* seriousness of the offending[147] and can never outweigh the gravity of the offence.[148] Courts must consider 'the subjective matters personal the offender which have reduced their moral culpability'[149] to ensure a sentencing outcome that is 'just in all the circumstances'.[150] In some cases, this may result in

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139 Ibid [49] (Morrison JA, Mullins P and Bond JA agreeing).
140 *Abdullah* (n 135) [2], [44]; *Kane* (n 134) [27] (Mullins P, Dalton JA, Flanagan JA).
141 For example, see *SDM* (n 45) [135].
142 *R v SDF* [2018] QCA 316.
143 Ibid [20].
144 Ibid [17] (Fraser JA, Philippides JA and Boddice J agreeing).
145 [2021] QCA 218 (Davis J, Sofronoff P and Williams J agreeing).
146 See, for example, *Downs* (n 138) [33].
147 *R v HYQ* [2024] QCA 151 [52] (Bowskill CJ, Dalton JA and Wilson J agreeing) ('*HYQ*').
148 *R v Mahony & Shenfield* [2012] QCA 366 [34] (Gotterson JA, Muir JA and Applegarth J agreeing); *Munda v Western Australia* (2013) 249 CLR 600, 619 [53].
149 *HYQ* (n 147) [52].
150 Ibid referring to this requirement under PSA (n 4) s 9(1)(a).

'a penalty that might appear lenient, having regard to the objective seriousness of the offending'. [151] For example, a person with a significant mental disorder causally to the offending will reduce their moral culpability and this may warrant a sentence lower than the objective seriousness of the offending.

The following factors are regarded in statute and case law as mitigating considerations in sentencing for sexual offences; however, they are not always given the same weight. The weight these are given depends on the individual circumstances of the case and the gravity of the offending:[152]

- guilty plea;[153]
- lack of criminal history or no relevant/recent convictions;[154]
- 'good character';[155]
- age of offender, such as young or elderly;[156]
- assistance to law enforcement, such as full admissions;[157]
- offender is a victim survivor of domestic violence;[158]
- offender is a victim survivor of child sexual abuse;[159]
- remorse;[160]
- rehabilitation efforts or willingness to engage in rehabilitation;[161]
- impact of childhood trauma and disadvantage;[162]
- where a person's time in prison will be more onerous[163] – for example, due to significant health conditions;[164] and

151 Ibid referring to the principles in *Verdins* (n 17); *Tsiaras* (n 17). See also *R v Sproutt; Ex parte A-G (Qld)* [2019] QCA 116, [42] (Sofronoff P, Gotterson JA and Henry J agreeing); *R v FAS* [2019] QCA 113 [134] (Ryan J, Fraser and Morrison JJA agreeing); *R v Burge* [2004] QCA 161, 18 (McMurdo P, Mullin J and Jerrard JA given separate reasons for judgment, each concurring as to the orders made); *R v Miller* [2022] QCA 249.

152 *R v Shales* [2005] QCA 192, 9 (de Jersey CJ, McPherson and Keane JJA agreeing).

153 PSA (n 4) s 13. The weight attributed to a plea of guilty is discussed in Chapter 15.

154 *R v Smith* (n 59) 30 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing); *Wallace* (n 80), 6 [19] (Bowskill CJ and Bond JA agreeing).

155 PSA (n 4) ss 9(2)(f), (3)(h), (6)(h); *Ryan v The Queen* (2001) 206 CLR 267 ('*Ryan*'). For a sexual offence to a child under 16 years, the court must not have regard to the person's good character if it assisted the person to commit the offence: PSA (n 4) s 9(6A).

156 *Wallace* (n 80) 6 [19] (Bowskill CJ and Bond JA agreeing); *Newman* (n 123), 8 [44] (Williams JA and White J agreeing).

157 PSA (n 4) s 9(2)(i); *Smith* (n 59) 10 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing). PSA (n 4) ss 13A–13B. See also *R v WBT* [2022] QCA 215 [30] (McMurdo and Flanagan JJA and Freeburn J); *R v LAT* [2021] QCA 104 [12] (McMurdo JA, Morrison JA and Burns J agreeing).

158 PSA (n 4) s 9(10B). This was introduced in the *Domestic and Family Violence Protection (Combatting Coercive Control) and Other Legislation Amendment Act 2023*, which commenced 23 February 2023.

159 Generally, there needs to be evidence as to the causal connection between the offending being sentenced and an offender's own victimisation: *R v MBY* (n 51) [74]–[75] (Morrison JA, Muir JA and Daubney J agreeing).

160 PSA (n 4) ss 9(2)(g), (6)(i); *Smith* (n 59) 10 [49] (Morrison JA, Holmes CJ and McMurdo JA agreeing).

161 *R v D'Arcy* [2001] QCA 325 [167] ('*D'Arcy*').

162 *R v KU; Ex parte A-G (Qld) (No 2)* [2011] 1 Qd R 439, 476–77 [133], [140], 480 [149] (de Jersey CJ, McMurdo P and Keane JA agreeing); *Wallace* (n 154) 6 [19] (Bowskill CJ and Bond JA agreeing); *MBY* (n 51) 13–17 [60]–[76] (Morrison JA, Muir JA and Daubney J agreeing) citing *Bugmy v The Queen* [2013] HCA 37 ('*Bugmy*') and *Munda v Western Australia* [2013] HCA 38.

163 See *R v O'Sullivan; Ex parte A-G (Qld); R v Lee; Ex parte A-G (Qld)* (2019) 3 QR 196 [156] (Sofronoff P, Gotterson JA and Lyons SJA); *R v Males* [2007] VSCA 302 [51]: 'Counsel will need to make clear to the sentencing court how the particular protection regime is said to make the offender's experience of imprisonment harsher than it would be if those conditions had not been imposed.'

164 See *D'Arcy* (n 161) citing *R v Pope* [32] QCA 318; CA No 271 of 1996, 30 August 1996.

- cognitive impairment and/or mental illness;[165] particularly if this was causal to the offending. it will reduce a person's moral culpability (blameworthiness).[166]

6.4 What other jurisdictions do

6.4.1 The legal frameworks used to assess offence seriousness are similar to those used in Queensland

The approach in other jurisdictions generally involves a mix of legislative guidance and case law guidance. Some jurisdictions have created legislative circumstances of aggravation, statutory aggravating factors, sentencing guidelines and formal guideline judgments. These different types of guidance, and the Council's recommendations regarding reforms in Queensland, are discussed in **Chapters 8 and 10**.

In New South Wales, for example, judicial officers must assess the objective seriousness of an offence by identifying factors relevant to the 'nature of the offending' and where that offending falls in the range of conduct covered by the offence.[167] When assessing the objective seriousness, the following factors are considered relevant:

- the offending conduct (for example, for sexual assault involving non-consensual sexual intercourse, the range of acts that can constitute 'sexual intercourse' as defined);
- the offender's mental state (or fault element) when they committed the offence; and
- the consequences of the offending (the harm).

There is debate about whether matters personal to the perpetrator should form part of the 'nature of the offending', and therefore should be considered when assessing objective seriousness.[168] In New South Wales, the distinction between objective factors and matters going to culpability only matters where this is important to the operation of the standard non-parole period scheme.[169] The standard non-parole period represents the non-parole period for an offence 'that, taking into account only the objective factors affecting the relative seriousness of that offence, is in the middle of the range of seriousness.[170]

The NSW Court of Criminal Appeal ('NSWCCA') has said some personal factors may, in some circumstances, be relevant to assessing both the objective seriousness of an offence and the moral culpability of the perpetrator.[171] These include:

- motive;
- provocation;
- non-exculpatory duress;
- the perpetrator's mental illness, mental health impairment or cognitive impairment;
- the perpetrator's age.[172]

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165 See *R v WBK* (2020) 4 QR 110, 129 [53]–[54] (Lyons SJA and Boddice J agreeing, with Fraser JA in dissent).
166 PSA (n 4) ss 9(2)(d), (f), (3)(j), (6)(g), (j); *Verdins* (n 17); *Tsiaras* (n 19); *Yarwood* (n 17).
167 *Muldrock v The Queen* (2011) 244 CLR 120 [27].
168 See *DS v R* (2022) 109 NSWLR 82 [71].
169 On the operation of the standard non-parole period scheme see Chapter 8.
170 *Crimes (Sentencing Procedure) Act 1999* (NSW) 54A(2).
171 *DS v R* (2022) 109 NSWLR 82 [96]; *Paterson v R* [2021] NSWCCA 273 [29]; *Yun v R* [2017] NSWCCA 317 [40]–[47]; *Tepania v R* [2018] NSWCCA 247 [112].
172 Ibid.

In the 2023 decision of *R v Eaton*,[173] the NSWCCA found that for a personal factor to impact the assessment of objective seriousness, there must be 'more than a simple or indirect causal connection between the relevant subjective feature of the case and the offending'.[174]

The Victorian Court of Appeal has been clear that 'the absence of … aggravating features does not mean … that his offending fell into the lower range. Their absence simply means that the offending, while grave, was not even more serious'.[175]

The Sentencing Guidelines for England and Wales set out 3 tiers of harm and 2 tiers of culpability to assist judicial officers in their assessment of seriousness for rape.[176] Harm factors include severe psychological or physical harm, pregnancy or STI as a consequence of offence, abduction, violence or threats of violence (beyond that which is inherent in the offence) and victim vulnerability. How extreme those factors are will determine whether the offence sits in categories A, B or C. Similarly, culpability factors include a significant degree of planning, abuse of trust, acting with others, previous violence against the victim, recording the offence, and whether the offence was motivated by the victim's race, religion, sexual orientation or disability. The type of rape conduct is not a factor of harm or culpability.

6.4.2 Jurisdictions categorise non-consensual sexual acts differently and maximum penalties vary

While, in Queensland, rape and sexual assault are two distinct offences capturing different forms of conduct (including sexually penetrative acts), there is no uniform approach in Australia or internationally regarding how conduct is categorised and offences are structured. The labels used for these criminal acts also differ.

Under the common law, rape was defined as carnal knowledge of a woman against her will and was confined to a narrow definition of what constituted 'sexual intercourse'.[177] As acknowledged by the Australian Law Reform Commission ('ALRC') in 2010, '[s]tatutory extensions and modifications to the common law crime of rape have been made in all Australian jurisdictions to varying degrees, but with resulting inconsistency across jurisdictions'.[178]

Rape (and its equivalents) now adopt a gender-neutral approach and generally (but not universally) involve penetration of the genitalia by a penis, object or body part (such a finger, hand or tongue), as well as penetration of the mouth by a penis. Compelling another person to take part in sexual penetration is also criminalised in several jurisdictions.

In contrast to the approach in most Australian jurisdictions, Canada has a broad offence of sexual assault that does not distinguish between penetrative and non-penetrative non-consensual sexual acts.

In Queensland, non-consenting mouth–genital contact without penetration is sexual assault under section 352(2), with a maximum penalty of 14 years. This includes where a person puts a victim's penis

173 *R v Eaton* [2023] NSWCCA 125 [49].
174 Ibid affirming the approach taken by the High Court in *Muldrock v The Queen* (2011) 244 CLR 120 and *Bugmy* (n 162).
175 *DPP v Tewksbury (a pseudonym)* 271 A Crim R 205; [2018] 38 [74] ('*Tewksbury*').
176 Sentencing Council for England and Wales, *Sentencing Guideline for Rape* (effective from 1 April 2014) and *Sentencing Guideline for Rape of a Child Under 13* (effective from 1 April 2014).
177 Australian Law Reform Commission, *Family Violence: A National Legal Response* (ALRC Report 114) [25.8].
178 Ibid.

(or testes) into their mouth without their consent. However, in the ACT,[179] New South Wales,[180] South Australia,[181] the Northern Territory[182] and Western Australia,[183] this conduct is rape (or its equivalent).

Maximum penalties, discussed in **Chapter 8**, also differ, and some jurisdictions have adopted tiered penalties structured around the presence or absence of aggravating factors.

Acts of gross indecency and indecent assaults, as for rape, are similarly categorised differently across jurisdictions and maximum penalties differ.

For more information, see section 10.2 of the **Consultation Paper: Background**.

For acts falling under the definition of rape in Queensland, the Model Criminal Code Officers Committee that led the development of work on a Model Criminal Code over the 1990s favoured the adoption of a descriptor of 'unlawful sexual penetration'.[184] The Committee also supported establishing a separate offence of compelling sexual penetration (capturing self-penetration, or forced penetration of a third person, which in Queensland fall within the aggravated (life) sexual assault provision) and 'indecent touching without consent' to capture other acts of indecent assault, again with a separate offence of compelling indecent touching.[185]

6.4.3 Case law supports the seriousness of each offence being based on its own individual circumstances, not just the type of penetration or act involved

As discussed in **Appendix 4**, the Council's analysis has found a clear 'clustering' of sentences for rape based on the different types of conduct involved (discussed further in **Chapter 7**). The same can be said for sexual assault, where distinctions are often made between 'over clothing' and 'under clothing' offences and, for acts of indecent assault, what part of the body has been touched.

Other Australian jurisdictions

In New South Wales, the Court of Criminal Appeal ('NSWCCA') has affirmed that determining the objective seriousness of an offence depends on all the circumstances of the case and is not confined to the nature of the act committed by the perpetrator. Similar to the position in Queensland, in *R v Hibberd*[186] ('*Hibberd*'), it was held that while the type of penetration 'is an important factor, it is not to be regarded as the sole consideration'.[187]

When comparing penile–vaginal and penile–anal penetration with cunnilingus or fellatio, the NSWCCA has said 'the penetration of a victim by a sexual organ derives its seriousness from a consideration of the particular circumstances of the case rather than from the nature of the sexual act itself'.[188] A similar view is held for digital penetration, with comments being made in the 2009 decision of *Hibberd* that 'there is

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179 *Crimes Act 1900* (ACT) s 50.
180 *Crimes Act 1900* (NSW) s 61HA.
181 *Criminal Law Consolidation Act 1935* (SA) s 5.
182 *Criminal Code Act 1983* (NT) sch 1 ('*Criminal Code* (NT') s 208G.
183 *Criminal Code Act Compilation Act 1913* (WA) ('*Criminal Code* (WA)') s 319.
184 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code – Chapter 5: Sexual Offences Against the Person Report* (May 1999). Queensland was not represented on the Committee.
185 Ibid.
186 (2009) 194 A Crim R 1.
187 *R v Hibberd* (2009) 194 A Crim R 1 [56] ('*Hibberd*').
188 *R v Andrews* [2001] NSWCCA 428 [6]. Although this was a two-judge bench decision it was cited with approval and applied in *R v Hajeid* [2005] NSWCCA 262 [52]; *R v MS* [2005] NSWCCA 322 [16] and *R v Sanoussi* [2005] NSWCCA 323 [32].

no canon of law which mandates a finding that digital penetration *must* be considered less serious than other non-consensual acts of sexual intercourse'.[189] Tobias JA said the law in support of non-consensual sexual intercourse by digital penetration being viewed as being generally less serious than an offence of penile penetration, should change:

> The time has come for this Court to depart from any prima facia assumption, let alone general proposition, that digital sexual intercourse is regarded as less serious than penile sexual intercourse … [T]he objective seriousness of the offence is wholly dependent on the facts and circumstances of a particular case …[190]

In *R v Shannon*,[191] Howie J of the NSWCCA said that penile penetration of a young child is 'the most serious form of sexual assault for the obvious reason that it is the most likely to result in physical injury to the child'.[192]

The NSWCCA has noted that 'the duration of offending is no measure of its seriousness' and that 'sexual offences of allegedly short duration, minutes, rather than hours, can have lifelong effects'.[193]

Support has been given by the South Australian Court of Appeal to the position that 'there is no hierarchy of sexual penetration and the seriousness of every offence must be determined according to its own individual circumstances',[194] with similar statements made by the Victorian Court of Appeal[195] and the Western Australian Supreme Court of Appeal ('WASCA').[196]

For example, regarding 'the proposition that penile–vaginal penetration without consent is more serious criminal conduct, irrespective of any aggravating factors, than digital–vaginal sexual penetration without consent', Chief Justice Quinlan of the WASCA said in *Musgrave v The State of Western Australia*:

> That proposition is not only wrong, as a matter of law. It is incoherent.
>
> The proposition is wrong because, as this Court has repeatedly confirmed, there is no hierarchy of sexual penetration. The seriousness of every offence of unlawful sexual penetration must be determined by its own individual circumstances. Statements to the effect that digital penetration is 'ordinarily less serious or that penile penetration is 'often' perceived by the victim as a more serious affront to personal dignity, are not statements concerning the inherent seriousness of one form of unlawful penetration compared to others. They are statements describing, and explaining, variations in sentences imposed in the particular circumstances of previous cases. They do not express a principle and cannot be applied so as to suggest some *a priori* starting point for a sentencing court that is called upon to sentence a particular offender, for a particular offence against a particular victim.
>
> … Other than in the pages of the *Criminal Code*, sexual offences do not exist in the abstract. They are always, and in every case, a violation by one (or more than one) human being of another human being. And the impacts that such violations have on each individual victim are as many and varied as the individual experiences of victims themselves. To suggest that 'all things being equal' one form of violation is inherently more serious than the other is incoherent because, when it comes to such matters, 'all things are never equal'.[197]

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189 *Hibberd* (n 187) [56] (emphasis in original) cited with approval in *Musgrave v The State of Western Australia* [2021] WASCA [82].
190 *Hibberd* (n 187). This was a dissenting position.
191 *R v Shannon* [2006] NSWCCA 39.
192 Ibid 37.
193 *R v Jackson* [2024] NSWCCA 156 [53] referring to *R v Gavel* (2014) 239 A Crim R 469, [110], as cited in *Kelly v R* NSWCCA 189, [33].
194 *Baxter (a pseudonym) v The King* [2024] SASCA [42].
195 Judicial College of Victoria, *Victorian Sentencing Manual*, 335 ('*Victorian Sentencing Manual*') citing *R v Lomax* [1998] 1 VR 551, 558–9; *DPP (Vic) v Tewksbury* 271 A Crim R 205, 220 [67]; *DPP (Vic) v Elfata* [2019] VSCA 63, [36]. See also *DPP (Vic) v Mokhtari* [2020] VSCA 16, [41].
196 *Musgrave v The State of Western Australia* [2021] WASCA 67, 6–7 [5]–[8] (Quinlan CJ) and 73 [283] (Pritchard JA) ('*Musgrave*'); *The State of Western Australia v Perieira* [2023] WASCA 162, [45] (Buss P, Mazza JA and Vandongen JA agreeing); *The State of Western Australia v HNU* [2023] WASCA 6, [74] ('*HNU*').
197 *Musgrave* (n 196) [5]–[8] (Quinlan CJ).

In the same judgment, Buss P stated:

> It is impossible to create a hierarchy of the seriousness of the several categories of sexual penetration within the offence created by s 325(1). The facts and circumstances of each particular case determine the seriousness of the offence … the absence of any hierarchy of sexual penetration means that some forms of penetration cannot, in any and all circumstances, be considered less seriousness than others. That is, there can be no general assumption that some forms of penetration are intrinsically less serious than other forms of penetration.[198]

In the *State of Western Australia v Tumata*,[199] a case that involved 3 men repeatedly perpetrating physical and sexual violence against another prison inmate over a 2-week period, the WASCA found that the most serious form of penetration of those charged was using a broom handle to penetrate the victim survivor's anus[200] and the seriousness of all the rape offences[201] 'was heightened because they occurred in the context of the ongoing extortion of [the victim survivor], as well as the threats, assaults, causing bodily harm and aggravated indecent assaults perpetrated against him'.[202]

In a decision of the Victorian Court of Appeal, *Forbes (a pseudonym) v The Queen*,[203] the appellant argued it was an error that the digital–vaginal rape was given the same sentence (7 years) as the penile–anal rapes and that this 'invited scrutiny'.[204] The Court found the sentence imposed on the digital–vaginal rape was within the range of sentencing options, as it 'was perpetrated in the victim's own home, after she had attempted to flee from the applicant's violent attacks, whilst she was unconscious as a result of further assault upon her with her sleeping child close by, by her former domestic partner'.[205] The Court further rejected the argument that the sentence on one of the penile–anal rapes (considered to be the most serious by the sentencing judge) 'in some ways supports an argument that the sentence on [the digital-vaginal rape] is manifestly excessive'.[206] When comparing the relevant circumstances, the Court concluded that 'the sentence on [the penile–anal rape] was “merciful” rather than that the sentence on [the digital–vaginal] rape was excessive'.[207]

The Victorian Court has also noted that offending will be more serious where there are successive rapes (either over time or during a single course of offending):

> The repetition of the sexual abuse likely to heighten the victim's fear that the abuse will occur again, and to increase the damage which or she suffers. Equally the repetition is likely to make the offender progressively more aware of the effect the abuse is having on the victim. In each of these respects, culpability is heighted.[208]

New Zealand

The guideline judgment of the New Zealand Court of Appeal in *AM v The Queen*,[209] referring to previous decisions of that Court, noted that all forms of sexual violation (including rape and other forms of sexual connection) under the *Crimes Act 1961* carried the same maximum penalty of 20 years and that 'an approach which treats these forms of violation as broadly similar in the sentencing context is consistent

198 Ibid [126]–[127] (Buss P).
199 [2022] WASCA 161 ('*Tumata*').
200 Ibid, [135] (Mazza and Vaughan JJA, Quinlan CJ agreeing).
201 This offence is called 'sexual penetration without consent' in Western Australia: *Criminal Code* (WA) s 325. The definition of 'sexual penetration', however, is broader than conduct classified as acts of 'rape' in Queensland and includes acts of cunnilingus or fellatio: ibid s 319 (definition of 'to sexually penetrate').
202 Ibid [120].
203 [2018] VSCA 341 (Ferguson CJ, Whelan JA, Macaulay AJA agreeing) ('Forbes').
204 Ibid [30].
205 Ibid [37].
206 Ibid [38].
207 Ibid.
208 *DPP v DDJ* [2009] VSCA 115 [32].
209 *AM v The Queen* [2010] 2 NZLR 750 ('*AM*').

with the purpose of the rape law reforms'.[210] This recognised that 'any act of sexual violation involves … "an act of violation to the body of another involving at the very least an invasion of privacy and loss of personal dignity"'.[211] The Court referred to the approach under the UK guidelines that applied the same starting points to all non-consensual penetration on the basis that, 'It is impossible to say that any one form of non-consensual penetration is inherently a more serious violation of the victim's sexual autonomy than another'.[212] However, it did suggest that 'seriousness increases as the degree of violation increases, for example, use of a finger as opposed to a fist',[213] and distinctions were made in setting the bands between sexual violation where the lead offence is rape, penile penetration of the mouth or anus, or violation involving objects and other forms of sexual connection.

Canada

Speaking of the offence of sexual assault in the context of offending against children, the Canadian Supreme Court in *R v Friesen* ('*Friesen*'), in relation to the type of conduct involved, said:

> Courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim … an excessive focus on the physical act can lead courts to under-emphasise the emotional and psychological harm to the victim that all forms of sexual violence can cause…the modern understanding of sexual offences requires greater emphasis on these forms of psychological and emotional harm, rather than only on bodily integrity.[214]

> It is an error to understand the degree of physical interference factor in terms of a type of hierarchy of physical acts. The type of physical act can be a relevant factor to determine the degree of physical interference. However, courts have at times spoken of the degree of physical interference as a type of ladder of physical acts with touching and masturbation at the least wrongful end of the scale, fellatio and cunnilingus in the mid-range, and penile penetration at the most wrongful end of the scale. This is an error – there is no type of hierarchy of physical acts for the purposes of determining the degree of physical interference … physical acts such as digital penetration and fellatio can be just as serious a violation of the victim's bodily integrity as penile penetration.[215]

6.4.4 Sexual offences against children are viewed as being more serious than offences against adults

There is significant case law in Australian and the jurisdictions examined to support the view that sexual offences against children are more serious than the same types of offences committed against adult victim survivors.

As acknowledged by Kirby J in *Ryan v The Queen*:[216]

> Courts must uphold the law which treats sexual offences against children and young persons as extremely serious crimes, particularly where (as is often the case) such offences involve breaches of trust and responsibility on the part of those who had such young persons in their care.[217]

In this context, the sentencing purposes of denunciation, deterrence and community protection assume particular importance in the context of the profound and ongoing impacts of this offending on children.

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210 Ibid 769 [68].
211 Ibid citing *R v Accused* (CA 265/88).
212 Ibid 769 [69] citing the UK Guidelines.
213 Ibid 766 [52]. Also mentioned by the court under the heading of 'degree of violation' was whether this involves 'very brief penetration as opposed to a lengthy assault', with the Court also commenting 'the more force involved in the actual violation the more serious the offending will be'.
214 *R v Friesen* [2020] 1 S.C.R [142] 500 ('*Friesen*').
215 Ibid [146] 502.
216 *Ryan v The Queen* (n 155).
217 Ibid 302 [117].

In the 2011 Canadian decision of *R v Woodward*,[218] the Court of Appeal for Ontario stated:

> When trial judges are sentencing adult sexual predators who have exploited innocent children, the focus of the sentencing hearing should be on the harm caused to the child by the offender's conduct and the life-altering consequences that can and often do flow from it. While the effects of a conviction on the offender and the offender's prospects for rehabilitation will always warrant consideration, the objectives of denunciation, deterrence and the need to separate sexual predators from society for society's well-being and the well-being of our children must take precedence.[219]

Further commenting:

> Three … consequences are well-recognised (i) Children often suffer immediate physical and psychological harm; (ii) children who have been sexually abused may never be able, as an adult, to form a loving, caring relationship with another adult; (iii) and children who have been sexual abused are prone to becoming abusers themselves when they reach adulthood.[220]

The NSWCCA has recognised that sexual abuse of children may have a 'profound and deleterious effect … upon victims for many years, if not the whole of their lives'[221] and 'will inevitably give rise to psychological damage'.[222] Even 'a single act of sexual abuse may have a substantial impact upon the psychological state of a young victim, with the likelihood of long-term adverse consequences'.[223]

In *R v MJR*,[224] a 2002 decision of the NSWCCA, Mason P stated there has been a pattern of increasing sentences for sexual offences against children and that this 'has come about in response to the greater understanding about the long-term effects of child sexual abuse and incest; as well as by a considered judicial response to changing community attitudes to these crimes'.[225]

Similar strong statements have been made by the Victorian Court of Appeal, which has determined that Victorian law has set 'an absolute prohibition on sexual activity with a child' for 2 purposes:

> The first is to protect children from the harms caused by premature sexual activity and - to that end - protect them from their own immaturity. On behalf of the community, Parliament has decided that those under 16 cannot meaningfully consent to sexual activity, even if subjectively attracted to the idea of participating in such activity. Secondly - and in order to advance a protective purpose - the prohibition is designed to deter those who might contemplate sexual activity with a person under 16.[226]

The Court examined similar decisions by Australian and international appellate courts, and found their conclusions aligned with other jurisdictions, including Queensland.[227] For example, the Court referred to statements by Baroness Hale of Richmond of the 'long term and serious harm, both physical and psychological, which premature sexual activity can do'.[228]

The Victorian Court of Appeal has emphasised 'the importance of general deterrence and protection of the community in relation to sexual offences against children'.[229]

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218 *R v Woodward* 2011 ONCA 610.
219 Ibid [76].
220 Ibid [72] referring to principles established in the earlier decision of *R v D* [2002] OJ No 1061 (QL).
221 *R v CMB* [2014] NSWCCA 5 [92], (Ward JA, Harrison and R A Hulme JJ agreeing).
222 *SW v R* [2013] NSWCCA 255 [52].
223 Ibid [52] referring to *RR v R* [2011] NSWCCA 2235 [147].
224 (2002) 54 NSWLR 368.
225 Ibid [57].
226 *Clarkson v The Queen* [2011] VSCA 157, 11 [26] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA agreeing).
227 Ibid 24 [63].
228 Ibid 13 [32] referring to *R v G* [2009] 1 AC 92 (Baroness Hale).
229 *Tewksbury* (n 175) [82] referring to *DPP v Garside* (2016) 50 VR 800, 810[25] and 820–21 [71] and *Meharry* [2017] VSCA 387 [166], [199].

In 2017, the High Court decision in *Director of Public Prosecutions v Dalgliesh (a pseudonym)*[230] made it clear that sentencing judges and intermediate appellate courts should not consider themselves constrained by current sentencing practice to impose a sentence they consider to be inadequate in the particular circumstances. The High Court concluded that current sentencing practices were 'one factor and not the controlling factor in the fixing of a just sentence'[231] and the case was returned to the Victorian Court of Appeal and resentenced.[232]

In effect, the Court of Appeal's and High Court's decisions in these proceedings collectively meant that sentences for incest in Victoria not only should increase to better acknowledge the seriousness of this type of offending and better accord with community expectations, but should do so immediately, not incrementally.

In 2020, the Supreme Court of Canada handed down its landmark decision of *R v Friesen*[233] ('*Friesen*'), which determined that Canadian courts should impose higher sentences for sexual violence offences committed against children.

Friesen has been referred to with approval by the South Australian Court of Appeal, including by Chief Justice Kourakis in the 2023 decision of *R v Lian*.[234] His Honour included relevant passages from the Canadian Supreme Court decision of *Friesen* and findings from the Final Report of the Royal Commission into Institutional Response to Child Sexual Abuse on the impact of sexual offending on children. He encouraged 'all sentencing judges to familiarise themselves with the content of those materials'.[235]

Some of the main aspects of *Friesen* were extracted in *Lian* and included in an appendix to that case.[236] A summary is provided below:

Personal autonomy, bodily integrity, sexual integrity, dignity and equality

- 'The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children.'
- Emotional and psychological 'forms of harm are particularly pronounced for children. Sexual violence can interfere with children's self-fulfilment and healthy and autonomous development to adulthood precisely because children are still developing and learning the skills and qualities to overcome adversity.'
- 'Sexual violence causes additional harm to children by damaging their relationships with their families and caregivers.'
- 'The ripple effects can cause children to experience damage to their other social relationships.'

Harms to families, communities and society

- 'The Criminal Code recognizes that the harm flowing from an offence is not limited to the direct victim against whom the offence was committed.'

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230 *Dalgliesh* (n 51).
231 Ibid [68] (Kiefel CJ, Bell and Keane JJ). See also [78]–[79], [82] (Gageler and Gordon JJ).
232 *DPP v Dalgliesh (a pseudonym)* [2017] VSCA 360.
233 *Friesen* (n 214).
234 *R v Lian* [2023] SASCA 122 ('*Lian*'). See also *R v Harris* [2023] SASCA 129; *R v Bradley* [2024] SASCA 56; and *R v Beaumont* [2023] SASCA 128.
235 *Lian* (n 234) [99].
236 Ibid 'Appendix A – Extracts from *The Queen v Friesen* [2020] 1 S.C.R. 424 (Supreme Court of Canada)'.

- 'The ripple effects of sexual violence against children can make the child's parents, caregivers, and family members secondary victims who also suffer profound harm as a result of the offence.'
- 'Beyond the harm to families and caregivers, there is broader harm to the communities in which children live and to society as a whole.'

Wrongfulness of exploiting children's weaker position in society

- 'The protection of children is one of the most fundamental values of Canadian society. Sexual violence against children is especially wrongful because it turns this value on its head.'
- 'Children are most vulnerable and at risk at home and among those they trust.'

Degree of responsibility of the offender

- 'Courts must also take the modern recognition of the wrongfulness and harmfulness of sexual violence against children into account when determining the offender's degree of responsibility. They must not discount offenders' degree of responsibility by relying on stereotypes that minimize the harmfulness or wrongfulness of sexual violence against children.'
- 'Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child.'
- 'All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender – the offender is treating the victim as an object and disregarding the victim's human dignity.'
- 'The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable.'[237]

In the same decision, Kourakis CJ observed:

> it has long been accepted that sentences for sexual offending against children must be calculated to protect children, who are by reason of their age, naïve and vulnerable from the predations of adults. Children are easily influenced and have only a limited understanding of the nature, consequences and, in particular, risks of sexual relationships with adults.
>
> ... the need for general deterrence in order to protect children is not limited to paedophiles. It is not limited to offenders who have developed settled criminal habits. It applies to all people who commit sexual offences against children. [238]

His Honour further noted that there must be a 'proportionate relationship' between offenders in 'formal or informal positions of trust' and those 'who do not occupy these positions' when sentencing sexual offences against children, stating:

> Sentences for all offending against children will necessarily be fixed at a point along a continuum of sentences calibrated to reflect the particular offences, and the applicable maximum penalty, and the aggravating and mitigating circumstances of each case.[239]

In another South Australian decision of *R v Bradley*,[240] reference was made by the Court to submissions made by the Director of Public Prosecutions citing other relevant passages in *Friesen*, including to counter

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237 Ibid.
238 Ibid [99], [107] (Kourakis CJ, Lovell and Doyle JJ agreeing).
239 Ibid [103].
240 *R v Bradley* (n 234).

views that a child's non-resistance to sexual offending constitutes 'de facto consent' and referring to the element of grooming often involved in this form of offending.[241]

In *R v Beaumont*,[242] the South Australian Court of Appeal noted the studies and research referred to in *Friesen* and made by the Royal Commission into Institutional Responses to Child Sexual Abuse, finding that they:

> demonstrate that a number of assumptions often made require care if not reconsideration. These include assumptions to the effect that children may not be at significant risk of psychological harm where the offending does not involve what might be thought more serious, invasive physical contact by an offender.[243]

The South Australian Court of Appeal has further found 'the significant, lifelong emotional and psychological harm caused to victims can be inferred without direct evidence'.[244]

6.4.5 Relationship and context between victim survivor and offender

Several jurisdictions now recognise that offences occurring in the context of a pre-existing relationship may be just as serious and harmful as those committed against a stranger.

In Victoria, the 'existence of a relationship between the offender and the victim may be relevant in assessing the gravity of the offending'.[245] On the one hand, offending in a domestic context 'can never be mitigating and may be aggravating, particularly in cases of family violence, rape[246] or other sexual offending'.[247] On the other, 'the absence of any relationship may be significant, and offending against an "innocent stranger" is a serious offence'.[248] However, 'there is no rule that a rape committed by a partner or former partner is intrinsically more or less serious than one committed by a stranger'.[249]

The NSWCCA has determined that a pre-existing relationship between an offender and a victim does not mitigate the criminality of the rape; however, seriousness may be diminished where it 'suggests some prevarication or at least initial consent on the part of the victim'.[250] The NSWCCA has contrasted those circumstances with rape committed by a stranger, observing that the latter would have 'a further element of terror and fear'.[251] However, 'the fact that [rape] occurred in a domestic context (as distinct from an attack by a stranger) does not lessen their gravity'.[252]

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241 Ibid [42] citing *Friesen* [150]–[151], [153]–[154].
242 *R v Beaumont* (n 234).
243 Ibid [48].
244 *Warner v The King* [2022] SASCA 142 [76].
245 *Victorian Sentencing Manual* (n 195) 84.
246 *Forbes* (n 203) [42] 'the context of domestic violence is also very important'.
247 *Victorian Sentencing Manual* (n 195) 84 (references omitted).
248 Ibid.
249 Ibid 341 citing *Mason* (n 108) [7], *Shrestha v The Queen* [2017] VSCA 364 (11 December 2017) [17] and *DPP (Vic) v MacArthur* [2019] VSCA 71 [65], [75].
250 *R v Cortese* [2013] NSWCCA 148 [55] (Beech-Jones J, Hoeben CJ and Harrison J agreeing). See also, *Bellchambers v R* [2011] NSWCCA 131 [47]; *NM v R* [2012] NSWCCA 215 [59].
251 *ZZ v R* [2013] NSWCCA 83 [103].
252 Ibid [104] citing *Heine v R* [2008] NSWCCA 61 [40].

6.4.6 The use of additional violence is aggravating, but the fact that no additional violence is used cannot support an argument the harm caused was not significant

The Victorian Court of Appeal has stated that 'the absence of force or violence' in sexual violence matters does 'not in any relevant sense “mitigate” the offending'.[253] Rather, when additional violence, coercion or force is required to ensure a victim survivor engages in sexual activity then a 'significant aggravating factor' is present.[254] Similar remarks have been made by the WASCA.[255]

The Victorian Court of Appeal also has said:

> The very act of rape is inherently serious, simply by virtue of the invasion of the victim’s bodily integrity without consent. It is, quite simply, an act of violence, whether or not accompanied by other violent conduct. The violation is physical, emotional and psychological. It follows that, aggravating features apart, all acts of non-consensual penetration are objectively serious, irrespective of the form and the extent of the penetration.[256]

In *Dalgleish (No. 1)*, the Court of Appeal 'emphatically rejected' the assertion there was no violence accompanying the incest offending, along with 'the associated implication that no harm was really done to the victim'.[257] Referring to the Victorian Sentencing Advisory's Council's report on *Sentencing of Offenders: Sexual Penetration with a Child Under 12*, the Court said, '[S]uch arguments rest on a serious misconception about the nature of a sexual abuse of a child.’[258]

Similarly, in the context of sexual offending against children, the Supreme Court of Canada has said:

> We would emphasize that courts should reject the belief that there is no serious harm to children in the absence of additional physical violence. As we have explained, any manner of physical sexual contact between an adult and a child is inherently violent and has the potential to cause harm.[259]
>
> The fact that additional forms of violence such as weapons, intimidation, and additional physical assault may not be present does not provide a basis to ignore the inherent violence of sexual offences against children[260]

6.4.7 There is some recognition that attitudes to women and other vulnerable groups may be relevant to assessing culpability and risk of reoffending

While the Canadian case of *Friesen* was concerned with sexual violence offending against children, the Court also took the opportunity to comment on other matters, including the relevance of evidence that the person sentenced has misogynistic attitudes and beliefs. The Court commented that 'we do emphasize that judges should be attentive to evidence of an offender’s misogynistic attitudes. Such attitudes may have a significant bearing on, among other factors, moral blameworthiness, insight and likelihood to reoffend.'[261]

While there is no legislative recognition of specific attitudes and beliefs as an aggravating feature in Queensland, a new aggravating factor has been introduced that applies to some offences in circumstances where the offence was motivated by hatred or serious contempt for a person or group of

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253 *Clarkson v The Queen* [2011] VSCA 157, 29 [80] (Maxwell ACJ, Nettle, Neave, Redlich and Harper JJA agreeing).
254 Ibid.
255 See *Tumata* (n 199).
256 *DPP (Vic) v Mokhtari* [2020] VSCA 161 [41] (Maxwell P, Beach JA and Weinberg JA).
257 *DPP v Dalgleish (a pseudonym)* [2017] VSCA 148 [45].
258 Ibid [46].
259 *Friesen* (n 214) [82] (citations omitted).
260 Ibid [152].
261 Ibid [180].

person in relation to race, religion, sexuality, sex characteristics or gender identity.[262] These reforms, when legislated, were not extended to the offence of sexual assault or other sexual offences.

6.5 Council findings on how Queensland courts determine offence seriousness

The High Court has affirmed transparency of sentencing is important and that 'accessible reasoning is necessary in the interests of victims, of the parties, appeal courts and the public'.[263]

A key source of information about how courts assess seriousness is their sentencing remarks, which are the official record of how the sentencing court determined the seriousness of the offence and its reasons for sentence.

In **Appendix 6**, we report on our findings in detail based on our review of a sample of sentencing remarks regarding how courts approach sentencing for rape and sexual assault, including in determining offence seriousness.

In this section, we discuss relevant high-level findings relating to recognition of offence seriousness, together with the reflections of our subject matter expert interview participants on what factors or case characteristics make one example of rape or sexual assault more serious than another.

6.5.1 Recognition of offence seriousness for rape and sexual assault

Sentencing remarks analysis

The Council's thematic analysis of a sample of sentencing remarks highlighted a number of aspects relevant to offence seriousness – see **Appendix 6** for more information.

Judges and magistrates regularly recognised that sexual assault and rape offences were inherently serious. The following comments are illustrative of the types of remarks made with respect to rape:

> The matter is obviously serious. Any case of rape is serious. (Rape, major city, imprisonment < 5 years, #19)

> Your offending is particularly serious. The offences of rape that you committed each carry a maximum penalty of life imprisonment. That should indicate to you how very seriously our Parliament considers this sort of offending. (Rape, major city, imprisonment > 5 years, #5)

> Your offending is particularly serious. The offences of rape that you committed each carry a maximum penalty of life imprisonment. That should indicate to you how very seriously our Parliament considers this sort of offending. (Rape, major city, imprisonment > 5 years, #5)

The same types of observations were made when sentencing for sexual assault:

> All cases of sexual assault are serious… (Sexual assault, regional/remote, higher courts, custodial, #4)

> But be under no misapprehension, [perpetrator]. Your offending was serious. It has caused no doubt irreparable harm to each of the complainants. (Sexual assault, regional/remote, higher courts, custodial, #5)

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262 *Criminal Code* (Qld) s 52B inserted by *Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld) pt 3. This part commenced on 29 April 2024: *Proclamation No 2 – Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Act 2023* (Qld) SL 193/2023.

263 *Markarian* (n 39) [39] (Gleeson CJ, Gummow, Hayne and Callinan J agreeing).

> The offences that you have committed are each serious ones. They involve, to some extent or another, violence and the violation of another person's body. The offences of sexual assault are, in my view, the more serious of the offences that I am dealing with... (Sexual assault, major city, higher courts, custodial, #12)

Aggravated sexual assaults were considered even more so:

> That is exacerbated by the fact that your offending against [victim survivor] was repetitive and continuous over a number of years and, further, that it escalated to the offence of oral sex, which was count 2 on the indictment. It is more seriously regarded by Parliament, having a maximum penalty of 14 years imprisonment, and should be regarded more seriously in the sentencing process. (Sexual assault, major city, higher courts, custodial, #2)

The Council's analysis found that judicial officers most commonly identified victim vulnerability when assessing offence seriousness in sentencing remarks. Judicial officers often focused on the impact of the offending on the victim survivor, particularly if there were circumstances that made the victim survivor vulnerable when assessing the offence seriousness. In these cases, the additional factor of the offending involving a breach of trust/abuse of power was often present.

The following comments were made in the context of sentencing for rape, one of which involved a separate offence of sexual assault:

> I think you know by now that your behaviour was very serious. This was a terrible breach of trust when you were in a position of power over that young girl. You subjected her to vile, degrading sexual assault and oral rape, and caused her significant ongoing distress. (Rape, major city, imprisonment < 5 years, #11)

> This is extremely serious and concerning criminal offending. You brazenly abused your position as guardian of your 11 or 12 year old stepdaughter, someone who is entitled to feel safe and protected in your presence. These are heinous acts that have had a devastating consequence, unsurprisingly, on this young woman, who, despite telling someone at the time, was not believed. Unsurprisingly, too, this offending has torn apart the family. (Rape, major city, imprisonment < 5 years, #23)

> To offend in a sexual way against your own daughter who was so young within the sanctity of her own home when she was so vulnerable, by reason not only of her age but by reason of you being the only other person in the house and being her father, is reprehensible... (Rape, major city, imprisonment < 5 years, #22)

Sentencers also identified sexual assaults committed against a vulnerable victim survivor, including one who was sleeping, as being more serious on this basis – for example:

> It has always been viewed extremely seriously, any sort of sexual assault, but particularly despicable when it is a woman who is asleep or unconscious. (Sexual assault, major city, higher courts, custodial, #13)

The potential of language used to minimise offence seriousness

There has been a growing focus on the importance of language in the context of criminal proceedings, including sentencing. Some academics have explored, for example, how psychological explanations for behaviour and causal attributions may transform deliberate acts of sexual violence into acts that are non-deliberate and non-violent.[264]

The Council found some examples of problematic language being used in the way sexual assault and rape conduct was described in sentencing for rape and sexual assault that could risk minimising the seriousness of this conduct, including:

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264 See, for example, Linda Coates and Allan Wade 'Telling it like it isn't: Obscuring perpetrator responsibility for violent crime' (2004) 15(5) *Discourse and Society* 499.

- Not fitting words to deeds – that is, using terms to characterise conduct which are more suitable to consensual acts rather than to rape or sexual assault:
    - forced oral contact as 'kissing';[265]
    - forced vaginal penetration as ‘intercourse’ or ‘sex’;[266]
    - forced oral-genital contact/penetration as ‘oral sex’, ‘fellatio’ or ‘cunnilingus’;[267] and
    - violating physical sexual contact with a child as ‘play’ and ‘fondling’.[268]
- Using language that omitted the agency of the offender – using words which passively present the offender’s actions, such as ‘insert’ or ‘put’. This may reflect the language used in police records and victim survivor statements.

> you pulled her pants down and then you proceeded to climb on top of the complainant and insert your penis into her vagina.[269]
>
> Count 20, rape, inserting your penis into [the victim’s] vagina, which was very painful … covering her mouth, inserting your penis into her vagina.[270]
>
> You then took your pants down and put your penis inside her vagina.[271]

- Minimising the culpability of the person being sentenced and/or harm caused, by saying 'no violence was used'[272] when the victim survivor was asleep/unconscious when the offender raped them, and the use of additional violence was not necessary to perpetrate the non-consensual act.

> You committed two separate acts of rape on a sleeping woman [his partner] … I also have regard to the fact that you did not use any weapons and that there was no overt violence or, indeed, there was no application any force more than what was required to achieve penetration.[273]
>
> You violated a woman, your friend, sleeping in her own bed. I accept that it is not suggested that you were violent, and that no threats were made.[274]
>
> [Defence counsel] confirms the absence of aggravating features, such as there was no violence, no threats, no intimidation, and no force used to overcome resistance. Indeed, it seems given the state that the complainant was in [semi-conscious due to heavy intoxicated], she did not offer any resistance, but

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265 For example, ‘kissed her on her mouth and put your tongue inside her mouth’ (sexual assault, regional/remote, higher courts, custodial, #4); ’you kissed her and gently pushed her on to a bed’ (sexual assault, regional/remote, higher courts, custodial, #9); ‘hugged her from behind and kissed her on the neck’ (sexual assault, major city, lower courts, custodial, #1); ‘grabbed her with his hands on either side of her head and kissed her on the lips’ (sexual assault, major city, lower courts, non-custodial, #12)

266 For example, ‘you inserted your penis into her vagina and had sex with her until you ejaculated’ (rape, major city, imprisonment < 5 years, #12); ‘Each involve you having sexual intercourse with her while she was asleep’ (rape, major city, imprisonment < 5 years, #5).

267 See, for example, *R v LBC* [2023] QCA 178, 6 [17] and the way the respondent described the offender’s conduct and contrast the language used for the different types of rape conduct (j) ‘(ii) digital penetration of her vagina, (iv) his performing oral sex upon her, (iv) his forcing her to perform oral sex upon him and (vi) penile/vaginal rapes’).

268 ‘He then fondled the girl’s vagina (aged 8) … He then took his penis out of her mouth and had her play with it until he ejaculated’ [3]: *R v Ruiz; Ex parte Attorney-General (Qld)* [2020] QCA 72 [3] (Sofronoff P).

269 Rape, major city, imprisonment < 5 years, #15.

270 Rape, major city, imprisonment > 5 years, #19.

271 Rape, major city, imprisonment > 5 years, #17.

272 *R v Hutchinson* [2010] QCA 22 [22] (Keane JA, de Jersey CL and Douglas J agreeing). See also *Enright* (n 58) (Mullins P, Bond JA and Boddice AJA), where it was stated at [86] that: 'The sentencing judge found that the offending conduct did not involve other aggravating features such as violence, although that was not unusual in offences involving the sexual assault of a sleeping person.’

273 Rape, major city, imprisonment < 5 years, #5.

274 Rape, regional/remote, imprisonment < 5 years, #14.

> nonetheless, the point should be made that there is the absence of those aggravating features which occurs in some cases.[275]

We explore the use of language and its importance in more detail in **Chapter 15**.

Subject matter expert interviews

Several participants referred to the determination of the seriousness of offence as often involving a 'balancing exercise' for the sentencing judge. The seriousness of the offending was viewed as being case-specific and may be aggravated by one factor or a combination of factors when viewed together.[276]

For sexual assault, the nature of the assault was referred to by many interviewed as important when assessing offence seriousness [e.g. touching a person on top of clothing or under clothing (skin on skin) or other indecent assault conduct (e.g. rubbing genitals up against someone) or acts of gross indecency],[277] as well as the number of offences committed,[278] and persistence[279] whether the person was in a position of trust (including taxi and Uber drivers),[280] the age difference between the person who committed the offence and the victim survivor,[281] whether the offender had knowledge of the vulnerability of the victim survivor (for example, because of their age, background, history of previous sexual assault, abuse or neglect, level of intoxication or intellectual or physical disability)[282] and the impacts of the offending on the victim survivor (recognising that the impacts can vary considerably).[283]

Similarly, for rape, interviewees indicated that a broad range of factors impacted the assessment of the objective seriousness, including the type of rape committed, the context within which the offence occurred and various other relevant factors.

Circumstances where the victim survivor consented to sexual intercourse but did not consent to the non-use of a condom were considered less serious than circumstances where the victim survivor did not have the opportunity to communicate their non-consent at all (such as where the victim survivor was asleep or unconscious).[284] Circumstances involving a risk of pregnancy and/or contracting a sexually transmitted disease (STD) were also viewed as a 'much worse violation' than circumstances where there was no risk of this occurring.[285]

The context within which the offending occurred was also viewed as important when assessing its seriousness, with examples given including the age of the victim survivor, whether there was additional physical violence (particularly if gratuitous or protracted[286]) or threats of violence and/or a weapon used, the duration of the offending, whether it was premeditated, whether it involved the person breaking and entering the victim survivor's house at night, the nature of the relationship between the victim survivor and the person who committed the offence and the number of offenders involved. [287]

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275 Rape, regional/remote, imprisonment > 5 years, #2.
276 SME Interviews 7, 18.
277 SME Interviews 1, 9, 26.
278 SME Interview 9.
279 SME Interviews 5, 6, 12, 15, 25.
280 Ibid.
281 Ibid.
282 SME Interviews 5, 7, 9.
283 SME Interview 9.
284 SME Interview 9.
285 SME Interview 14.
286 SME Interview 22.
287 SME Interviews 3, 5, 6, 7, 8, 10, 11, 12, 13, 14, 26.

Some participants referred to opportunities to enhance understanding of legal practitioners about the harm caused by sexual violence offending.[288] One practitioner highlighted the importance of language used in the courtroom and in sentencing remarks, and said that practitioners need to be mindful of not using words that minimise or trivialise a victim survivor's experience and/or the offender's conduct.[289] The interviewee referred to comments made by Cardinal George Pell's defence barrister to describe the alleged crimes as 'no more than a plain vanilla sexual penetration case' and suggested that remarks like those were unhelpful:

> I've always said it's a real challenge … there is relativity of offending and that's fine. But this is what happened to this child. This is what happened to this particular woman. And so you don't need to characterize it anything other than this is what you did to her. That is the conduct. So I think, of course, everything is relative and comparable. But I think once you start labelling it, it undermines it to that person. And it objectively undermines it overall. So I think language is a huge thing for judicial officers. We really could learn a thing or two about particularly with sexual offenses, I think.[290]

6.5.2 The type of penetration for rape often guides assessments of offence seriousness

The Council's analysis has concluded that, despite Court of Appeal commentary, the type of penetration is used as the primary measure in determining offence seriousness. Our findings indicate that penetration is assessed on a scale, with digital and oral penetration (forced fellatio and cunnilingus) on the lower end, the use of a fist in the mid-to-high range and penile–vaginal and penile–anal penetration at the higher end of the spectrum of seriousness scale. Interviews with subject experts reinforced this view, with many practitioners viewing digital and oral rape offences as being less serious than penile–vaginal or penile–anal rape or rape with an object.[291]

As explored further in **Appendix 4**, sentencing levels for rape have remained relatively stable over the 18-year data period, with the median custodial penalty ranging between 5.0 and 6.0 years.

Although all forms of rape conduct have the same maximum penalty, our review of sentencing outcomes showed a clear difference in sentencing outcomes based on conduct type.

An analysis of rape cases sentenced between 1 July 2020 and 30 June 2023 by conduct and victim survivor age found penetrative conduct aligned with the hierarchy stated above. Median sentences were higher where the victim was a child, except for digital-vaginal rape, where the median was the same for child and adult victim survivors (3.0 years) (see Table 6.1).

Table 6.1: Median length of custodial sentences by type of rape and age of victim survivor (MSO)

Penetration type	Child victim (median)	Adult victim (median)	Total (median)
Penile–anal rape	9.0 years	6.8 years	8.0 years
Penile–vaginal rape	7.0 years	6.0 years	6.5 years
Digital–vaginal rape	3.0 years	3.0 years	3.0 years
Oral rape	4.0 years	*	4.0 years
Total	**4.8 years**	**5.5 years**	**5.0 years**

288 SME Interview 9.
289 SME Interview 11.
290 Ibid.
291 SME Interviews 6, 13, 14.

Source: Content analysis of sentencing remarks – see Chapter 4 for a description of the methodology.
Data includes matters sentenced between 2020–21 and 2022–23 (a 3-year period).
* Medians were not calculated for categories with less than 10 cases sentenced.

Sentencing remarks analysis

The thematic analysis of rape sentences examined whether judges identified types of penetration as more or less serious that another type in their remarks.

This confirmed that with respect to rape, the nature of the conduct was often considered relevant in assessing offence seriousness. For example:

> You committed two separate acts of rape on a sleeping woman, one of them involved anal penetration which I accept should be approached as a more serious act than the vaginal penetration, at least in the circumstances before me.[292]

> There were two different forms of penetration on the single occasion of sexual offending. Each of the sexual offences which I've described had particularly serious and distressing aspects to them. In particular, the penile penetration was neither shallow nor momentary but, rather, was prolonged and caused pain.[293]

> I have noted already that your offending extends beyond inappropriate touching and so involves the more serious counts of rape, which involve penetrative acts of the complainant's vagina by your fingers or forcing the complainant to perform oral sex on you. It is particularly aggravating in terms of your conduct that you ejaculated in the complainant's mouth.[294]

The Council also found examples where judicial officers used problematic language when discussing rape conduct – for example, using different language for some forms of rape conduct, which may reduce the seriousness of that conduct (e.g. using 'digital penetration' rather than digital rape and 'oral sex' rather than oral rape). Similarly, sometimes digital and oral rape were framed differently from penile rape when dealing with multiple counts of rape:

> it progressed to more invasive conduct involving digital penetration, oral sex and non-consensual penile vaginal intercourse … slid your hand under her underwear and digitally penetrated her. You then raped her.[295]

The Council notes this difference in language may reflect that until reforms in 2000, rape was defined as vaginal and anal penetration and practices of police, legal practitioners and judicial officers have not yet adjusted completely. It may also reflect broader social constructs of sexual activities that "real" rape is heterosexual penile/vaginal rape and oral and digital rape are foreplay activities, and therefore less important in the hierarchy of sexual activity. Certainly, some participants in the UniSC research referred to a 'pecking order' of sexual activity and 'the ranking of sexual behaviours by young people as "bases" suggests an incremental build up or working towards vaginal intercourse and the loss of virginity'.[296]

Sentencing submissions analysis

Given the markedly lower median sentences for digital and oral rapes for both children and adults, the Council was interested in understanding what case law practitioners use in submissions and the way in which submissions were being made for those types of offences. We wanted to know whether practitioners were applying recent Court of Appeal decisions affirming not compartmentalising

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292 Rape, major city, imprisonment < 5 years, #5.
293 Rape, major city, imprisonment > 5 years, #13.
294 Rape, regional/remote, imprisonment < 5 years, #4.
295 Rape, major city, imprisonment < 5 years, #18.
296 Dominique Moritz and Ashley Pearson and Dale Mitchell, *Community Views on Rape and Sexual Assault Sentencing: Final Report* (Sexual Violence Research and Prevention Unit, UniSC, March 2024) 39 ('*UniSC Final Report*').

penetrative conduct when recommending appropriate sentencing ranges,[297] and in the case of child victim survivors, the 2020 decision of *Stable,*[298] which recognised the Queensland Parliament's intention that sexual offences against children should be treated more seriously and that sentences should have increased following amendments in 2003 and 2010 to that effect.

The Council examined sentencing submissions for a sample of rape (MSO) cases sentenced in 2023. The methodology for this analysis is discussed in **Chapter 4**, with further information available at **Appendix 7**.

Our analysis showed that, generally, legal practitioners submit 2 or 3 cases that are factually similar to the matter being sentenced and that involve the same penetrative conduct. We found practitioners primarily relied on older cases in their submissions, with the majority of the 41 appeal cases referred to dating from between 2004 and 2014. Only 14 appeal cases referred to were from 2018 onwards.[299] We did not find any reference to *Stable*,[300] suggesting practitioners are not applying those comments to cases involving the rape of a child.

With one exception (discussed below in Case Study 2), the analysis found that appellate guidance surrounding not compartmentalising penetrative conduct was not being applied in child victim survivor cases. Related commentary in the 2020 case of *R v Smith,*[301] was discussed in 7 cases where an adult woman was the victim survivor of digital-vaginal rape. As discussed above in section 6.3.2, Morrison JA referred to remarks in *Colless* and *Wark* about rape conduct, noting that while there may be cases of digital or oral rape 'calling for punishment as great or exceeding those involving penile rape', it was accepted as a 'general proposition that penile rape will attract a higher sentence'.[302] However, none of the submissions argued for digital–vaginal rape to be sentenced as seriously as a penile–vaginal rape.

The 2 cases below illustrate current judicial commentary regarding the type of penetration and how it should impact the sentence the Council thought was problematic. The first illustrates that penile–vaginal rape is always regarded as more serious, even when it was an attempt, and the second is the only instance in the sample of cases examined where a prosecutor sought to increase the sentencing range for a penile–oral penetration of a child.

Case study 1: Rape of adult

The 57-year-old perpetrator pleaded guilty to 2 counts of vaginal rape (digital and lingual) of a 23-year-old woman with an intellectual impairment. He also attempted to rape her with his penis and sexually and indecently assaulted her. He pleaded guilty on the morning of trial, although the victim survivor had given evidence and been cross-examined via pre-recording. Both the prosecutor and defence submitted for parole eligibility at one-third. The case of *Smith* was relied upon by the prosecution (submitting for 3 years) and defence (submitting for 2.5 years). He was sentenced to a prison term of 2 years and 6 months with parole eligibility after serving 6 months. In relation to the rape conduct, the sentencing judge said:

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297 *RBG* (n 82) and *Wallace* (n 80) 5 [13] (Bowskill CJ) endorsing remarks made in *Wark* (n 67) by McMurdo P (at [2]), Mackenzie AJA (at [13]–[14]) and Cullinane J (at [36]), and also referring to remarks by Dalton JA in *RBG* (n 82) at [4] referring to *Smith* (n 59) [34]–[37] per Morrison J. Similar remarks were also made by Dalton JA in her dissenting judgment.

298 *Stable* (n 101).

299 See Appendix 5, section 5.3 for the list of cases identified in this analysis.

300 *Stable* (n 101).

301 *R v Smith* (n (n 59).

302 Ibid [35]–[37] (Morrison JA).

> [*Smith*] does provide some guidance in relation to the type of penalty to be imposed in relation to offending of this nature and whilst the offending against [the victim] was unacceptable in any way, **it is as is noted different at least to an actual rape of a penile vaginal character which would have been even more traumatic for her than is the nature of the offending perpetrated by you**. I note in that regard that *Smith*'s case specifically made reference to the *R v Colless* [2010] QCA 26 where the point was made that sentences in respect of digital rape may be expected to be less severe than other forms of rape and specific reference was made there to the considerations in relation to rape.[303]

Case study 2: Rape of child

The 42-year-old perpetrator pleaded guilty to 2 counts of oral rape of his 15- to 16-year-old son with mental health issues. The prosecutor submitted for 6 to 8 years, referring to comments in *Smith* to not to compartmentalise rape categories and *obiter* remarks by Justice Fryberg in *R v GAP* ('*GAP*') that penile-oral rape can be more serious than vaginal rape.[304] The prosecutor argued that, since the 2013 case of *GAP*, 'community attitudes towards this type of offending has hardened', to which the sentencing judge replied, 'that might be right, but I think I'm sort of more rather guided by the Court of Appeal'.[305] Defence counsel argued the aggravating features of the case were 'not uncommon', nor would they 'take this outside the realm and the scope of what's been imposed and considered by the Court of Appeal in comparable cases'. The judge agreed and sentenced the man to 4.5 years with parole eligibility after 18 months.

The Council's review suggests that there continues to be 'compartmentalisation' of rape conduct based on most submissions made – particularly given that the comparable sentences and Court of Appeal decisions referenced were invariably those that involved the same type of rape conduct being sentenced, rather than common law principles. As discussed in the second case example, on the rare occasion when a prosecutor argued that a higher range was warranted, this was not acted on by the sentencing judge, and attracted criticism by defence counsel because the prosecutor asked for a sentence that, in the defence's view, was entirely 'out of range'.

Subject matter expert interviews

This ranking of the seriousness of rape offending by penetration type was echoed by legal practitioners in the SME interviews who clearly set out sentencing ranges based on the rape conduct involved. Practitioners also recognised many contextual factors as increasing seriousness, including the age of the victim survivor (particularly if a young child), additional physical violence and whether the victim survivor was a stranger or the offence occurred in a domestic violence context or a breach of trust.[306] However, practitioners often referred to stranger scenarios, where a perpetrator attacked the victim survivor in a public place, usually using violence, as an example of a very serious rape offence.[307] However, several practitioners identified penile–vaginal and penile–anal rape as the most serious form of rape conduct:

> There's also that divide of digital and penile, anal, what the mechanism of rape is. Yeah, there's a gradation; exactly. Digital less, penile, anal, implement, more.[308] The cases say, for example, that vaginal penetration is particularly serious. They say this in the context of maintaining, in particular. And … I understand conceptually why that's so, because of, I suppose, a risk of pregnancy if you're talking about a female who's able to become pregnant. But if you're talking about sentencing in the context of a child who is between six and 12, I don't really understand why the

303 (QDC18, emphasis added).
304 *GAP* (n 74) [138].
305 (QDC22).
306 For example, SME Interviews 5, 6, 7, 13, 14, 15, 16, 19.
307 For example, SME Interviews 7, 14, 18, 22.
308 SME Interview 6.

> absence of vaginal penetration makes it a less, rather than a more serious, offence. Because I'd have thought any form of penetration, oral penetration, it's all horrendous if you're 6. If you know what I mean. But the cases squarely say that vaginal penetration makes it, you know, it's kind of worse.[309]
>
> So the sentences imposed, for example, for digital penetration rapes are significantly lower than penile penetration rapes.[310]
>
> So obviously penile rapes are going to be penile vaginal. Penile oral are considered quite significant, perhaps obviously more so to digital penetration. A vaginal or penile anal rape.[311]
>
> Kind of rape, whether it's a digital or penile rape or anal rape.[312]
>
> Nature of penetration. Penile vaginal or penile anus most serious; then penile mouth. Digital penetration lower level.[313]
>
> I think generally the penile and the anal are considered more serious than digital penetration – and this is adults we're talking about, of course … Digital penetration to a young child would be equally traumatic.[314]

Contrary to these perspectives, some SME participants thought not enough weight was being given to the objective seriousness of digital and oral rape (particularly when an offender commits penile–oral rape), with the comment: '[s]entencing outcomes do not adequately reflect the offensive nature of it and the demeaning aspect of it'.[315] Several participants told us there should be more emphasis placed on the impact of the offending on the victim survivor.[316] However, they noted this assessment could be complex, as 'you never really know what the impact on the individual is',[317] which was particularly the case for offences committed against young children.[318] It is always important to consider 'what's happened to that person, recognising everyone is different'.[319]

While those interviewed noted that offending is often categorised as being more or less serious depending on the type of conduct (e.g. digital–vaginal, penile–oral or penile–vaginal), interviewees viewed child sex offending as being in a 'different category' in terms of offence seriousness[320] — recognising that any form of penetration is serious and harmful from a child's perspective.[321] The comment was made that 'the tendency to 'overemphasise the mechanics of rape is problematic for sentencing' offences against children.[322]

For multiple counts of rape committed against multiple child victim survivors, a life sentence was described by one participant as the 'proper outcome' for this type of offending.[323]

309 SME Interview 8.
310 SME Interview 13.
311 SME Interview 15.
312 SME interview 16.
313 SME Interview 20.
314 SME Interview 22.
315 SME Interview 8.
316 SME Interviews 11, 17.
317 SME Interview 1.
318 SME Interview 11.
319 SME Interview 10.
320 SME Interview 9, 26.
321 SME Interview 8.
322 SME Interview 11.
323 SME Interview 26.

6.5.3 Courts consider a broader range of factors in assessing offence seriousness for sexual assault

Sentencing remarks analysis

The Council's sentencing remarks analysis found the offence of sexual assault established by section 352 of the *Criminal Code* (Qld) captures a broad range of conduct. Cases examined between 1 July 2020 and 30 June 2023 of non-aggravated sexual assault involved the offender (without consent):

- using their hands to touch, grab or slap a victim survivor's buttocks;
- kissing victim survivors on the neck or mouth;
- grabbing or groping a victim survivor's breasts;
- using their hands to touch, rub or grab a victim survivor's genitals;
- rubbing their penis on a victim survivor's body or genitals (no penetration);
- masturbating in front of the victim survivor; and
- throwing ejaculate on the victim survivor.

Cases involving aggravated sexual assault involved the offender (without consent):

- putting their mouth on a victim survivor's genitals, including taking the victim's penis in their mouth;
- having or pretending to have a weapon or committing the offence in company.

Generally, when the conduct involved skin-on-skin contact it was treated more seriously by judicial officers. Our analysis found that offending involving on-skin contact was more like to result in a custodial penalty, with three-quarters of cases receiving a custodial penalty (73.7% to 75.0% depending on whether the contact was on another body part or genitals). However, the exception was on-skin contact involving a person's mouth on a body part (not genitals), in which just over half (55.6%) of cases received a custodial penalty. In contrast, the Council found over-clothes contact with genitals received a custodial penalty in 58.8 per cent of cases, and in 49.1 per cent of cases involving over clothes contact with another part the body.

See **Appendix 4** for more details.

Subject matter expert interviews

During SME interviews, legal stakeholders commented that in assessing the seriousness of sexual assault, it was often the context in which the offending took place (whether the person was known to the victim survivor or a stranger) and the person's prior criminal history that were relevant, rather than the conduct alone. If there was additional physical violence involved, the offending was predatory, the disparity between the offender and victim survivor's age, the particular vulnerability of the victim survivor and emotional harm were all mentioned as relevant,[324] as well as whether it was a protracted incidence or momentary.[325] In this context, the person being in a position of trust was viewed as making these

[324] For example, SME Interviews 3, 4.
[325] For example, SME Interviews 5, 6, 17.

offences more serious[326] — which extended to rideshare drivers and taxi drivers, employers and other professionals, including security personnel.

Offences occurring in the context of a burglary – going into someone's home[327] – or the offence occurring in a secluded location were also mentioned.[328] These offences were generally viewed as more serious where several factors were present that, considered together, made the offending more serious.[329]

There were some distinctions drawn between whether offending was 'over clothes' or 'under clothes',[330] as well as the location of the touching (e.g. if it was around the genital area),[331] with the perceived level of 'invasiveness' or 'intrusiveness' viewed as relevant in this context.[332]

Some interview participants thought too much emphasis was placed on the 2005 Court of Appeal decision *R v Demmery*[333] ('*Demmery*'), which was acting as a "ceiling" despite understanding of harm for sexual violence having evolved significantly since that decision.[334] In *Demmery*, the 27-year old applicant had pleaded guilty to one count of sexual assault of a 16-year old girl in which 'he pulled her underwear to the side and then masturbated and ejaculated over her vulval area. She was asleep while he did that'.[335] The Court found the sentencing judge's description that 'the offence was another instance of a situation where a female in a very vulnerable situation had been taken advantage of for the self-gratification of a male, albeit a person of generally good character and standing', was 'quite accurate'.[336] The Court of Appeal found the sentence of 2 years' imprisonment, suspended after 6 months, was manifestly excessive, and he was resentenced to 12 months' imprisonment, suspended after 25 days (time the applicant had already served in custody prior to being released on bail) 'because of concern at returning to jail a person with a good prior history'.[337] This is discussed further in **Chapter 9**.

6.6 The Council's view

6.6.1 Rape and sexual assault are inherently serious

Key Finding

1. Rape and sexual assault are inherently violent and serious acts

Rape and indecent assaults are inherently violent and serious acts involving the exercise of dominion by one person over another person's body without their consent, in breach of the person's right to personal autonomy, bodily and sexual integrity and sexual identity. Engaging in unwanted sexual conduct involves a fundamental disregard of another person's dignity, right to equality, right to be free from violence and discrimination, right to be free from torture and cruel, inhuman or degrading treatment, and right to privacy.

326 For example, SME Interviews 9, 21.
327 For example, SME Interviews 15, 25.
328 For example, SME Interviews 23, 24.
329 For example, SE Interviews 7, 8, 11.
330 For example, SME Interviews 8, 9, 12, 13.
331 For example, SME Interviews 11, 14, 16, 17.
332 SME Interviews 5, 12, 13, 16, 20.
333 [2005] QCA 462.
334 SME Interviews 14, 15, 16, 19.
335 *Demmery* (n 333) [7].
336 Ibid [9].
337 Ibid [26].

A lack of physical injury does not mean these offences have not caused substantial and ongoing harm, or that they should be treated as less serious than if physical injury had been caused.

See **Recommendations 1 and 4.**

As discussed earlier in this chapter, the Council has been asked to advise whether penalties currently imposed on sentence under the PSA or sexual assault and rape offences adequately reflect community views about the seriousness of this form of offending, and the sentencing purposes of just punishment, denunciation and community protection.

The Council's assessment of 'adequacy', explored in detail in the following chapter, includes an assessment of how serious sexual assault and rape offences are relative to other offences, including those that share the same maximum penalty or are comparable for other reasons.

As discussed in **Chapter 5**, there have been several efforts, both in Australia and internationally, to rank offences based on assessed offence seriousness and harm.

Rape is consistently ranked as among the most harmful and serious forms of criminal offending, while generally falling below intentional homicide and, depending on the circumstances, offences causing permanent serious physical injury or with a high risk of lethality (death).

While the methodology adopted for the University of the Sunshine Coast's research does not allow for comprehensive offence-based rankings, it was clear that community members assess the seriousness of sexual offences on a range of factors, including:

- the long-term psychological and emotional harm suffered by victim survivors of rape and sexual assault;
- the perpetrator's relationship with the victim survivor, including whether they were in a position of care, supervision or authority in relation to the victim survivor;
- the age of the victim survivor, with offences against children inherently more serious;
- the context of the offence, such as whether it took place at night or whether the offence was committed in company.[338]

A threshold question for the Council in determining whether there is a need for any legislative or other changes to ensure the imposition of appropriate sentences, as requested under the Terms of Reference, is the Council's assessment of offence seriousness based on evidence gathered during this review.

The Council agrees there are several aspects of rape and sexual assault that make these offences particularly serious, based on the nature of the act and the harm caused, including:

- **These offences are inherently violent in nature**. Regardless of whether or not accompanied by other acts of violence, rape and indecent assault are properly considered to constitute acts of violence.
- **They involve a high degree of violation of a victim survivor**: All acts of non-consensual penetration and aggravated sexual assault involve an extreme form of being subject to another's

338 *UniSC Final Report* (n 296).

dominion, resulting in the highest level of intrusions to sexual and bodily integrity. They are acts demeaning to the victim survivor that expose that person to high levels of humiliation.[339]

- **The harm caused by this offending can be significant and long-lasting**: These offences may involve pain, shame, loss of self-esteem, a sense of violation and objectification,[340] with rape being described by one legal scholar as equating to 'murder of the spirit'.[341] Just because the victim survivor has not suffered physical injuries as a result of the offence does not mean these offences have not caused substantial and ongoing harm, or they should be treated as less serious than if physical injury had been caused. For children, the impacts of sexual violence offending are typically even more pronounced and enduring (see **Key Finding 2**).
- **They involve a significant infringement of a victim survivor's human rights**: Engaging in unwanted sexual conduct involves a fundamental disregard of another person's dignity, right to equality, right to be free from violence and discrimination, right to be free from torture and cruel, inhuman or degrading treatment and right to privacy. As the Supreme Court of Canada recognised in the leading case of *Friesen*, the harm caused by rape and sexual assault arises from the violation of these fundamental and basic human rights involving the wrongful exploitation of the victim survivor by the offender:[342]

This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm.[343]

We further acknowledge that **the culpability of the person being sentenced will depend on the individual facts and circumstances of the case.** Both rape and sexual assault may involve a wide range of culpability; however, some circumstances will increase the culpability of the perpetrator and therefore the seriousness of the offence. These include premeditation and planning, an existing relationship between the perpetrator and victim survivor and/or the person being in a position of trust, the offence being committed 'in company' and multiple instances of offending.

In our view, the recognition of rape and some forms of aggravated sexual assaults as being among the most serious offences in the *Criminal Code* (Qld) and the current maximum penalty of life imprisonment (the highest maximum penalty available at law) are appropriate and warranted.

Indecent assaults violate the same rights as rape, although in the case of non-aggravated sexual assaults, the level of violation will in most cases be lesser and the harm caused may be of a less-severe nature. There is no doubt, however, that these are offences of violence – a fact we discuss in **Chapter 8**.

As discussed in **Chapter 2**, some groups are particularly vulnerable to sexual abuse, including children, Aboriginal and Torres Strait Islander women, people with a disability, women from culturally and racially marginalised (CARM) groups, LGBTIQA+ people and sex workers.

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339 von Hirsch and Nils Jareborg (n 14) 26: This point is made by von Hirsch and Jareborg with respect to ranking the seriousness of both forcible rape and what they describe as 'date rape'.
340 Nicola Lacey, 'Unspeakable subjects, impossible rights: Sexuality, Integrity and Criminal Law' (1998) 11(1) *Canadian Journal of Law and Jurisprudence* 47.
341 Ibid citing Robin West, 'Legitimating the Illegitimate: A Comment on "Beyond Rape"' (1993) 93 *Columbia Law Review* 1442, 1448.
342 *Friesen* (n 214) referred to with approval in *Lian* (n 234) [99], 'Appendix A' (Kourakis CJ).
343 Ibid referred to with approval in *Lian* (n 234) [99], Appendix A (Kourakis CJ).

Victim survivor vulnerability is an important consideration in assessing the seriousness of the offending, both due to the higher level of harm that may be experienced and the higher level of culpability of the perpetrator in targeting a vulnerable victim survivor.

6.6.2 Offences against children are more serious than offences against adults

Key Finding

2	**Sexual offences against children are particularly serious** Due to the vulnerability of children, sexual offences committed against children are particularly serious, noting the inherently wrongful nature of the offending conduct and the profound ongoing harm these offences cause to children during their formative years. See **Recommendation 1.**

Courts have recognised that an adult who commits sexual offences against children will, in all but exceptional cases, be highly culpable for their actions due to their awareness of the harm their conduct is likely to cause and because children are highly vulnerable:

> Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child … For sexual offences against children … save for possibly certain rare cases, offenders will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child.[344]

It is inherently exploitative for an adult to engage in sexual activity with a child. This exploitation is fixed in the power imbalance between adults and children, and is compounded when an adult is in a position of trust, care or authority over a child and when the victim survivor is particularly young and therefore more vulnerable to sexual violence. Courts have recognised that 'the intentional sexual exploitation and objectification of children is morally blameworthy because children are so vulnerable'.[345]

In sentencing, courts are required to 'take the modern recognition of the wrongfulness and harmfulness of sexual violence against children into account when determining the offender's degree of responsibility'.[346] Courts must avoid reliance on stereotypes that minimise the harmfulness or wrongfulness of this form of offending[347] or notions that there is a correlation between the type of physical act and the harm to the child – see also **Key Finding 3**.

Sexual offending always puts children at risk of serious harm and can permanently alter the course of a child's life, with the offending having broad and often far-reaching consequences, and some impacts only being realised later in life.[348] The Queensland Court of Appeal has said 'even a single sexual offence against a child may have terrible and enduring consequences'.[349]

A 'robust body of research evidence now clearly demonstrates the link between child sexual abuse and a spectrum of adverse mental health, social, sexual, interpersonal and behavioural as well as physical

344 Ibid [88] (citations omitted).
345 *Friesen* (n 214) [89].
346 Ibid [87] citations omitted – referred to with approval in *Lian* (n 234) [99], Appendix A (Kourakis CJ).
347 Ibid.
348 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 3, Impacts* (2017), 9.
349 *RAZ* (n 95) 5 [23] (Sofronoff P, Gotterson JA and Boddice J agreeing).

health consequences'.[350] The impacts of childhood sexual abuse may vary, but are likely to include 'shame, embarrassment, unresolved anger, a reduced ability to trust others' and a fear that people can and will abuse them and their bodies in future.[351]

While 'childhood experiences of sexual abuse manifest differently in each individual and may change over time',[352] the negative impacts associated with this abuse can be profound and lifelong.

While sexual violence against either a child or an adult is serious, the Queensland Parliament has determined that sexual violence against children should be punished more severely. The evolution of the Queensland Parliament's and the Queensland community's view of the gravity of offences involving child sexual abuse is reinforced by Parliament's reforms to the law that applies to sentencing for child sexual offences. Since 2003, Parliament has advanced a number of legislative changes to the PSA and *Criminal Code* applicable to sexual offences against children.[353] While rape was never expressly identified in those reforms, many of those changes apply to the sentencing of a person convicted of raping a child under 16. We agree with the Court of Appeal's remarks in *Stable* that:

> Community attitudes change and the amendments made in 2003 reflected such changes [that currents sentencing practices may depart from past practices by reason of changes in understanding long-term harm to victim survivors]. The amendments have brought the circumstances of the victim and other potential victims to the forefront of a sentencing judge's consideration. These are matters that address the community's denunciation of sexual offences against children. These provisions constituted a legislative representation about the community's attitude to sexual offences against children, particularly against very young children. The amendments made these matters the starting points for the judicial task. Statute law, having the higher authority of the legislature, cannot be waived by the parties simply because they are ignorant of it or because they choose not to argue it although it is applicable. Once such omission comes to light in proceedings that are still current within the Judicature, judges are under a duty to give them effect.[354]

Parliament also legislated an aggravating factor for offences committed in a domestic and family violence context.[355] Sadly, sexual violence offences are often perpetrated by a family member. We note comments by the Court of Appeal in *O'Sullivan* that this reform (and others concerning violence against children) are,

> legislative instructions to judges to give greater weight than previously given to the aggravating effect upon a sentence that an offence was one that involved infliction of violence on a child and that the offender committed the offence within a home environment.[356]

We agree with the Court's guidance that '[w]hen applicable legislation changes, the laws as changed must be applied faithfully and a previous range of sentencing may no longer be useful'.[357]

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350 The Bugmy Bar Book, 'Childhood Sexual Abuse' (November 2023) <https://bugmybarbook.org.au/wp-content/uploads/2024/03/BBB-Childhood-Sexual-Abuse-chapter.pdf> ('Bugmy Bar Book), citing the Australian Institute of Family Studies, 'The Long-Term Effects of Child Sexual Abuse' (CFCA Paper No 11, January 2013) 23; Divna Haslam et al, 'The Prevalence and Impact of Child Maltreatment in Australia: Findings from the Australian Child Maltreatment Study' (Brief Report, Australian Child Maltreatment Study, Queensland University of Technology, 2023) 17–18.

351 *Friesen* (n 214) (citing statements made in *R v McDonnell* 1997 CanLII 389 (SCC), [1997] 1 S.C.R. 948) [57] referred to with approval in *Lian* (n 234) [99], Appendix A (Kourakis CJ).

352 Bugmy Bar Book (n 350) citing Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Volume 3, Impacts* (2017) 25.

353 See section 7.2.3 and Chapter 8 for more details.

354 *Stable* (n 101) [45] (references omitted).

355 PSA (n 4) s 9(10A).

356 *O'Sullivan* (n 96) [93].

357 Ibid [94].

The Council is concerned that current sentencing levels for rape in Queensland do not significantly reflect the important differences in seriousness between conduct perpetrated against a child when compared with the same types of offences committed against adults.

In our view, there is a need for legislative reform to clarify the position at law that offences against children must in every case be treated as more serious on the basis of a child's level of vulnerability clearly signalling that higher sentenced for such offending are warranted.

We outline our reasons in **Chapter 7**.

6.6.3 The seriousness of an offence should be assessed by its own individual circumstances

Key Finding

3. **The seriousness of rape should be assessed based on the circumstances of each case, not just penetration type**

The seriousness of every rape offence must be determined based on the particular circumstances of each case. Sentences for rape should reflect that one form of sexual penetration is not inherently any more or less serious than another form of sexual penetration.

See **Recommendations 6, 18, 19 and 20**.

Section 349 of the *Criminal Code* (Qld) makes no distinctions between the relative seriousness of rape based on conduct alone, meaning one form of penetration is not more or less serious than another. The seriousness of every rape must therefore be determined by its own particular circumstances.

Focusing on the type of penetration as the primary measure of offence seriousness in our view is an inherently flawed exercise. It suggests that a hierarchy of penetration exists, and that some physical acts are, by their very nature, always more serious on the basis of conduct alone and without reference to the surrounding context of the offending and circumstances of those involved, or the harm caused to the victim survivor. This is particularly so for children, and it is dangerous to assume that there is a 'correlation between the type of physical act and the harm to the child'.[358]

The Council agrees with comments made by the Queensland Court of Appeal in *Wark*[359] that the seriousness of every rape offence must be determined by its own particular circumstances, and notes the Court of Appeal's endorsement and restatement of this principle in the more recent 2023 decision of *Wallace*.[360]

Based on our review of sentencing submissions, we share the Court's concerns about 'an unwarranted tendency in submissions … when comparing not just rape cases but sexual offending cases in general, to compartmentalise cases according to the specific "category" of sexual offending involved' (see **Appendix 7**).[361] We have observed and been advised by subject matter experts that there is a hierarchy of penetration in Queensland, with digital and oral penetration (forced fellatio and cunnilingus) on the lower end of the scale, use of a fist in the mid-to-high range and penile–vaginal and penile–anal penetration at

358 *Friesen* (n 214).
359 *Wark* (n 67) [2] (McMurdo P), [13]–[14] (Mackenzie AJA), [36] (Cullinane J).
360 *Wallace* (n 80) 5 [13] (Bowskill CJ), [44]–[45] (Dalton JA). See also *R v RBG* [2022] QCA 143 [4] (Dalton JA) referring to *R v Smith* (n 59) [34]–[37] (Morrison JA).
361 *Wallace* (n 80) [45] (Dalton JA).

the most wrongful end of the scale. The Council's analysis of current sentencing outcomes showed that, with some exceptions, digital–vaginal rape receives the lowest penalties, while penile–anal and penile–vaginal rapes receive the highest (see **Appendix 4**).

Discussed further in **Chapter 7**, the position in Queensland is in contrast to a number of other jurisdictions that do not make these same distinctions.

As a UK Home Office review in 2000, *Setting the Boundaries: Reforming the Law on Sex Offences*, concluded in considering the seriousness of oral sex relative to other forms of penetration, '[f]orced oral sex is as horrible, as demeaning and as traumatising as other forms of forced penile penetration'.[362] In rejecting the establishment of any 'gradation' or 'degrees' of rape, the review team concluded:

> If we are to consider a rape as being not just an offence of violence, but a violation of the integrity of another person, then there is neither justification nor robust grounds for grading rape into lesser or more serious offences. The impact on victims is no less, and indeed there are arguments that it can be more serious and long-lasting. Rape is a very serious crime but sentences can, and should, reflect the seriousness of each individual case within an overall maximum.[363]

The Law Reform Commission of Western Australia, following its review of sexual offences, rejected differentiating between different forms of penetration on similar grounds, finding that all forms of penile and non-penile penetration 'constitute equally serious violation of the complainant's sexual autonomy and bodily integrity and may [depending on the circumstances involved] be equally serious'.[364] This is discussed further in **Chapter 7**. We endorse these comments.

We have also observed that the starting point for sentencing submissions by prosecutors and defence practitioners focuses on previous Court of Appeal and first-instance decisions involving rape conduct *of the same kind*, and few are from contemporary case law.[365] In our view, this can result in unhelpful distinctions being made based on conduct type, leading to assumptions about what type of penetration is 'worse' or 'more serious' or harmful. Further, relying on older case law may perpetuate outdated concepts of harm and power imbalances in relation to sexual violence. This may result in current sentencing practices reinforcing past norms and could mean that judicial officers are constrained when imposing sentences for rape, regardless of changing community attitudes. In this context, we acknowledge statements made by the High Court in *Kilic,* affirmed in subsequent cases by the Queensland Court of Appeal,[366] that 'current sentencing practices with respect to sexual offences may be seen to depart from past practices by reasons of changes in understanding about long-term harm done to victims', suggesting sentencing practices for these offences can change as we better understand the substantial harm they cause.[367]

The Council notes remarks by the Western Australian Court of Appeal that

> an assessment of seriousness of an offence of sexual penetration is not governed by whether the penetration involves a penile, digital, oral or other form of penetration, but, rather, depends on all of the circumstances of the offence.

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362 Home Office (UK), *Setting the Boundaries: Reforming the Law on Sex Offences* (July 2000) vol 1, 15 [2.8.5] ('*Setting the Boundaries*').
363 Ibid 16 [2.8.8].
364 Law Reform Commission of Western Australia, *Sexual Offences* (Project 113, October 2023) 181 [6.43].
365 See Appendix 7: The Council reviewed submissions for the most recent 24 cases considering oral rape and digital-vaginal rape of both child and adult victim survivors from 2022-23. Our analysis did not identify any reference to the recent decisions of *Stable* (n 101) or *Wallace* (n 80), and of the 51 appeal cases referred to in submissions, only 14 were from 2018 onwards, with the majority of decisions dating from 2004 to 2014.
366 See *O'Sullivan* (n 96) [103]; *Stable* (n 101) [45].
367 *Kilic* (n 40) [21] (Bell J, Gageler J, Keane J, Nettle J and Gordon J).

> Consequently, consideration of reasonably comparable cases in the present case should not proceed by reference to only cases involving oral penetration [the conduct in the case being reviewed].[368]

Another issue of concern that is often raised is the treatment of rapes committed by someone known to the victim survivor compared with 'stranger rapes'. We agree with the questioning by some of 'whether there are genuinely lesser rapes' and traditional conceptions of stranger rapes as being more serious than rapes perpetrated by partners, friends and family members.[369] The 2000 Home Office review relevantly found:

> Victim/survivor organisations told us that although all victims/survivors were deeply affected by rape, there was often greater victimisation in rapes that were seen as lesser than the traditional model of stranger rape. A woman or man attacked in the street is a chance victim – it is truly appalling, but no blame attaches to the victim. To be raped by someone you know and trust, whom you may let into your house, or when you visit theirs, is not such a matter of chance. The victim has made decisions to put their trust in the other person. There may or may not be overt physical violence but those victims face additional issues of betrayal of trust and being seen as, or feeling, guilty for being in that situation. Some research indicates that the level of violence in partner/ex-partner rape is second only to stranger rape. We were told by those who counsel victim/survivors that those raped by friends or family often find it much harder to recover and may take longer to do so. … The crime of rape is so serious that it needs to be considered in its totality rather than being constrained by any relationship between the parties.[370]

The same might be said regarding any unhelpful assumptions made about offence seriousness based on the relationship between the perpetrator and victim survivor for offences of sexual assault.

During our expert interviews, several of those interviewed pointed to the changes with the introduction of domestic violence as an aggravating factor as achieving a shift in attitudes that stranger rapes are, by their nature, more serious. However, this was not universally the case with the fact the person was a stranger being one of the factors (alongside many others) referred to in a number of interviews as making the offence more serious.[371]

We acknowledge that the description 'stranger rapes' is sometimes used as a convenient 'shorthand' for the types of factors that typically group together in such cases which contribute to the assessment of offence seriousness. However, in our view it is important that no assumption be made that stranger rapes 'will always' or 'will usually' be more serious than a rape by someone known to the victim survivor. These types of narratives play into the 'stranger rape' myth and what constitute 'real' rapes by suggesting such rapes are more serious and deserve more severe punishment.

Similar criticisms might be made about the focus in some cases on the absence of physical injury or the absence of the use of 'additional violence' as a reason to consider the offending as less harmful or serious due to its relevance to an assessment of the perpetrator's culpability. This is most concerning when the victim survivor is a child and violence is not required to achieve compliance or when the victim survivor (child or adult) was asleep or unconscious, and therefore additional violence, aside from the rape or sexual assault, was not required to commit the offence.

As discussed earlier in this chapter, the Court of Appeal has cautioned against the adoption of these types of default judgments that an absence of physical harm or use (or threatened use) of violence automatically renders a person's offending less serious than another example of offending. There may be

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368 *HNU* (n 196) [74] (Beech JA, Vaughan JA and Hall JA agreeing).
369 *Setting the Boundaries* (n 362) 16 [2.8.7].
370 Ibid.
371 For example, SME Interviews 20, 21, 22, 24.

very good reasons why the use of additional violence by the person perpetrating the act may not be necessary to facilitate its commission.

In our view, in assessing offence seriousness, the vulnerability of the victim survivor should be the overriding consideration, not whether 'actual violence' (as is sometimes suggested) is used (noting that all acts of rape and indecent assault are violent). This is because the more vulnerable the victim survivor (including due to factors such as age or other circumstances), the higher the level of culpability of the person in committing the offence.

While we do not discount the emphasis on the need for community protection in cases involving perpetrators who are unknown to the victim survivor, there are other aspects of offences committed by someone the victim survivor knows and trusts, which make these offences equally, if not more, serious. Such offences often involve a significant betrayal of trust and may in fact be no less traumatic than an offence committed by a stranger and result in a higher level of harm.

We note in some jurisdictions which have adopted sentencing guidelines or have issued guideline judgments, there is formal recognition that the 'starting points' or sentencing ranges for imposing a sentence for rape and sexual assault focus on factors impacting culpability and harm, irrespective of whether the perpetrator was a stranger or known to the victim survivor and the type of rape conduct/penetration involved. For example:

- In the sentencing guidelines issued by the Sentencing Council of England and Wales for rape, rape of a child under 13 and (sexual) assault by penetration,[372] the assessment of harm and culpability does not include any reference to the type of penetration involved, although abuse of trust is a factor in assessing culpability.[373] A separate guideline on domestic abuse which applies across all offences, including rape, states that '[t]he domestic context of the offending behaviour makes the offending more serious because it represents a violation of the trust and security that normally exists between people in an intimate or family relationship'.[374]
- Similarly, the draft sentencing guideline for rape currently under development by the Scottish Sentencing Council does not refer to the type of penetration in the assessment of harm and culpability.[375]
- In its guideline judgment,[376] *R v AM*,[377] the NZ Court of Appeal determined sentencing bands (i.e. starting points) based on harm and culpability. No distinction was made between different types of penetration, nor was penetration type a determinate of seriousness. Rather, the Court stated: 'It would be wrong to suggest that violation by digital penetration and oral violation (not involving penile penetration of the mouth) is always less serious.'[378] Cases provided by the Court as examples of those falling within different sentencing 'bands' involve a range of different

372 For a discussion of the role of guidelines, see Chapter 10.
373 Sentencing Council for England and Wales, *Guideline for Rape* (effective from 1 April 2014), *Guideline for Rape of Child Under 13* (effective from 1 April 2014) and *Guideline for Assault by Penetration* (effective from 1 April 2014).
374 Sentencing Council for England and Wales, *Overarching Principles: Domestic Abuse* (effective from 24 May 2018).
375 Scottish Sentencing Council, *Draft Sentencing Guideline: Rape* (2024) <https://www.scottishsentencingcouncil.org.uk/media/ufcaqjes/rape-draft-guideline.pdf>.
376 On the nature of 'guideline judgments', see Chapter 10.
377 *AM* (n 209).
378 Ibid [73] with reference to statements made in the earlier decision of *R v Singh* (CA160/02, 26 November 2002), which are consistent with those made by the Queensland Court of Appeal that 'any rigid categorisation is unhelpful. As the circumstances of this case clearly demonstrate, it is the total circumstances which need to be assessed and it is the combination of them which will indicate the appropriate sentencing level': [24].

> conduct, some of which involves offending committed by strangers and some by friends, acquaintances, intimate partners and family members. Factors are listed that increase culpability, with a statement made for offences committed against partners or ex-partners: 'Culpability is not reduced by any sense of entitlement associated with a current or previous relationship' noting 'there is no separate regime for sexual violation of a spouse or partner or those who have previously been in a relationship.'[379]

The updating and, where required, development of sentencing resources that provide prosecutors, defence practitioners and sentencing courts with clear advice about these matters, with reference to contemporary case law and research evidence, may go a long way towards raising awareness of these issues (see **Recommendation 6**).

Ongoing professional development and training are another critical aspect of ensuring court sentencing practice that continues to evolve in response to our improved understanding of the nature and impacts of sexual victimisation, the contexts in which sexual violence occurs and its differential impacts on those who are particularly vulnerable to abuse such as children, Aboriginal and Torres Strait Islander women, people with a disability, women from culturally and racially marginalised groups, LGBTIQA+ people and people who are vulnerable for other reasons, such as sex workers (see **Recommendations 18, 19 and 20**).

[379] Ibid [61].

Chapter 7 – Adequacy and appropriateness of sentencing outcomes

7.1 Introduction

As discussed in previous chapters of this report, the Council has been asked to determine whether penalties currently imposed on sentence under the *Penalties and Sentences Act 1992* (Qld) ('PSA') 'adequately reflect community views about the seriousness of this form of offending' and the purposes of sentencing, with a focus on just punishment, denunciation and community protection.[1] We have also been asked to identify any reforms required 'to ensure the imposition of appropriate sentences'.[2]

In this chapter, we consider:

- whether the current *penalty types* imposed on people convicted of rape and sexual assault (such as orders of imprisonment or suspended imprisonment, probation and fines) appropriately reflect the seriousness of this offending, and the purposes of sentencing; and
- whether current *sentencing levels* adequately reflect this – such as, for sentences of imprisonment, the length of sentence and minimum time required to be spent in custody prior to release into the community on parole, under a suspended prison sentence or on probation.

7.2 Views of offence seriousness and sentencing practices

7.2.1 Community views

The research that the Council commissioned the University of the Sunshine Coast ('UniSC') to undertake on community views has provided an important evidence base for our assessment of offence seriousness and adequacy. The detailed findings of this research are presented in **Chapter 5**.

The focus group research included several exercises designed to test offence seriousness. This approach had the advantage of enabling current sentencing practices to be compared with community views of relative offence seriousness without participants needing to attach a specific sentencing 'quantum' to specific offence or case scenarios, given the methodological problems with this approach. The methodology adopted for this research is discussed in **Chapter 4**.

Participants identified that the level of harm experienced by the victim survivor, the circumstances of the offending and the culpability of the perpetrator for the suffering inflicted all contribute to offence seriousness. A significant factor identified in assessing offence seriousness was the long-term

1 Appendix 1, Terms of Reference.
2 Ibid.

psychological harm involved in offences of sexual assault and rape, as well as the perpetrator's relationship with the victim survivor, which was identified as being a complex culpability factor.

In section 7.3.1, we discuss how these rankings compare with sentencing levels and outcomes.

7.2.2 Consultation views

In **Chapter 5**, we report on views expressed during consultation events, meetings and in submissions.

As discussed in that chapter, there was universal agreement among those consulted that the offences of rape and sexual assault are serious. Offences against children were viewed as being particularly serious.[3]

Participants at our consultation events pointed to the significant and long-lasting harm such offences can cause to victim survivors, affecting all aspects of their lives, from their sense of safety and general emotional and mental wellbeing to their personal and family relationships, their ability to engage in study and work, and their physical and mental health.

The broader question of whether sentences are 'adequate' and 'appropriate' generated a wide range of responses in submissions and at our consultation events, from those who viewed sentencing practices as generally 'adequate' and reflective of offence seriousness to those who felt very strongly that they did not and called for sentences to increase.

Generally, legal stakeholders thought ‘sentencing for sexual assault and rape offences adequately reflect the purposes of sentencing and the seriousness of these offences', although they generally supported providing courts with more options for sentencing, such as the ability to fix a parole release date and to combine suspended prison sentences with supervised non-custodial orders when sentencing for a single offence, in support of community protection and rehabilitation.

The inflexibilities of the current sentencing framework and barriers to the use of certain types of orders were viewed as likely contributing to the high proportion of sentencing orders for rape and sexual assault that do not involve supervision or a requirement to engage in treatment or other forms of interventions.

Many victim survivors and support and advocacy stakeholders were strongly of the view that sentences for rape and sexual assault are too low and do not align with community expectations.

They told us sentences must increase to better reflect community standards and the seriousness of this offending, and in order not to discourage victim survivors from reporting these offences and going through the criminal justice system process.

Subject matter expert interviews

Subject matter expert interview participants were invited to share their perspectives on the current approach by courts to assessing offence seriousness. These views are discussed in **Chapter 6**.

Adequacy of sentencing levels

In providing their views, some participants commented that sentences were generally sufficient, while others had concerns about current sentencing levels.

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3 Submission 1 (Name withheld) 1.

A few participants commented that sentences for sexual assault, in particular, 'are usually quite low' and may not reflect their true seriousness.[4] Reliance on dated case precedents was suggested as a potential reason for this. This issue is further discussed in **Chapter 8.**

As discussed in **Chapter 5**, some participants supported the view that particular forms of rape, such as penile–oral and digital–vaginal rape, should be treated as more serious than is currently the case, particularly where this involves offences committed against children – recognising that any form of penetration is serious and harmful from a child's perspective.[5] The comment was made that the tendency to 'overemphasise the mechanics of rape is problematic for sentencing'.[6]

Views about changes in sentencing practices

Interviewees expressed mixed views about whether sentences have increased over time.[7] Although most interviewees thought the sentencing outcomes appeared to have increased for domestic violence-related cases,[8] offences involving child victims[9] and sexual assault offences,[10] some interviewees expressed the view that there had not been a 'noticeable [increase] in terms of sentence outcomes'.[11]

Some interview participants recognised that there had been changes to societal views, with corresponding impacts upon the sentences being imposed. For example, one interviewee noted that rape offences committed within a domestic setting are now viewed as just as significant as a rape offence committed by a stranger – which represents a marked difference from previous sentencing practices.[12]

Interviewees also referred to sentences for penile–vaginal rape being higher than for non-penile rape,[13] and said penile–vaginal rape sentencing levels had stayed relatively stable over time.[14]

Legislative changes were generally viewed as having had a significant impact on the sentences imposed for some offences. One interviewee referred to statements made by Justice Sofronoff that legislative changes needed to be taken into account when determining the appropriate sentence.[15] As a relevant example, the legislative change that resulted in digital penetration being moved to conduct falling within the offence of rape rather than indecent treatment of a child under 16 years was viewed by interviewees as having resulted in a slight uplift in penalties for this form of conduct.[16]

Interviewees also noted the importance of being aware of different maximum penalties across different timespans and encouraged practitioners to avoid using dated case precedents for sexual assault (from the 2000s to 2010) as these represent decisions and views 'from a different era'.[17]

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4 For example, SME Interviews 14, 15.
5 SME Interview 8.
6 SME Interview 11.
7 SME Interviews 3, 7, 9, 14, 15, 17.
8 SME Interviews 6,9, 15, 17, 26.
9 SME Interviews 13, 20.
10 SME Interviews 7, 23.
11 SME Interview 16. A similar view was expressed in SME Interview 25.
12 SME Interview 15.
13 SME Interviews 9, 12, 14, 22.
14 SME Interview 7.
15 SME Interview 10.
16 SME Interview 7.
17 Ibid.

7.2.3 Parliament's views of offence seriousness

Maximum penalties

As discussed in **Chapter 6**, maximum penalties are an important indication of Parliament's views about the seriousness of sexual assault and rape offences. This is because the maximum penalty reflects the views of Parliament (and therefore the community) about the seriousness of each offence relative to other offences. It is a factor that courts in Queensland are required to take into account in sentencing.[18]

The highest maximum penalty available in Queensland is a life sentence. Rape and sexual assault offences with circumstances of aggravation charged under section 352(3) of the *Criminal Code* both carry this maximum penalty.[19] Examples of other offences with a maximum penalty of life imprisonment include murder (to which both a mandatory life sentence and mandatory minimum non-parole periods apply), manslaughter, repeated sexual conduct with a child, incest, unlawful striking causing death, acts intended to cause grievous bodily harm and other malicious acts, armed robbery/robbery in company/robbery with violence, several aggravated forms of burglary (including at night, with violence/threat of violence, armed, in company or by break) and arson.[20]

Sexual assault offences charged under section 352(2) of the *Criminal Code* (indecent assaults or acts of gross indecency where these include bringing into contact any part of the genitalia or the anus of a person with any part of the mouth of a person) carry a maximum penalty of 14 years. Offences with 14-year maximum penalties include non-aggravated forms of burglary, engaging in penile intercourse with a child under 16 years (previously known as 'carnal knowledge with or of children under 16'), indecent treatment of a child under 16 in circumstances where the child is 12 years or older, distributing and possessing child pornography, grievous bodily harm, torture, aggravated forms of serious assault and attempted rape.[21]

Non-aggravated sexual assault has a maximum penalty of 10 years (s 352(1)). Offences that share a 10-year maximum penalty with non-aggravated sexual assault include some aggravated forms of assaults occasioning bodily harm (armed or in company, or if motivated by hate), several forms of stealing offences and unlawful use of a motor vehicle without circumstances of aggravation.[22]

The maximum penalties for the review offences are indicative of the high level of seriousness with which rape and aggravated forms of sexual assault in particular are viewed.

The role and purpose of maximum penalties as a form of sentencing guidance for courts is discussed further in **Chapter 8**.

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18 *Penalties and Sentences Act 1992* (Qld) s 9(2)(b) ('PSA').
19 *Criminal Code Act 1899* (Qld) sch 1 ('*Criminal Code* (Qld)) s 352(3).
20 Ibid s 222 (Incest), s 229B (Repeated sexual conduct with a child), s 305 (Punishment of murder), s 310 (Punishment of manslaughter), s 314A (Unlawful striking causing death), s 317 (Acts intended to cause grievous bodily harm and other malicious acts), s 411 (Punishment of robbery), s 419 (Burglary), 461 (Arson).
21 Ibid s 419(1) (Burglary), s 215(2) (Engaging in penile intercourse with a child under 16), s 210(2) (Indecent treatment of a child under 16) s 228C (Distributing child exploitation material), s 228D (Possessing child exploitation material [both offences have a 20-year maximum penalty if the person uses a hidden network or anonymising service in committing the offence], s 320 (Grievous bodily harm), s 320A (Torture), s 340 (Serious assaults), s 350 (Attempt to commit rape).
22 Ibid ss 339(3) (Assaults occasioning bodily harm), s 398 (Punishment of stealing), s 408A (Unlawful use or possession of motor vehicles, aircraft or vessels).

Reforms to conduct captured within the offences of sexual assault and rape

In 2000, changes were made to the offence of rape in response to recommendations made by the Taskforce on Women and the Criminal Code,[23] which signalled that certain forms of non-consensual penetrative conduct were to be viewed differently than had previously been the case.

Rape was redefined from being limited to 'carnal knowledge' (penile–vaginal and penile–anal intercourse) to include penetration by the offender of the vagina, vulva or anus of the victim by any body part or object, and penetration of the mouth of victim by the offender's penis.[24] This was conduct previously included in the offence of sexual assault.

In recommending this change to expand the offence of rape, the Taskforce observed:

> In Queensland, penetration of the vagina or the anus by an object or a part of the body other than the penis is called 'sexual assault'. It carries the same maximum penalty as rape.
>
> Clearly, penetration with an object such as a bottle or a piece of wood is a significant violation. The potential for serious injury can be far greater than that if a penis is used.
>
> Likewise, penetration of the mouth by the penis (being forced to perform oral sex) is for many women (and men who are victims) as bad as vaginal rape. Under present law [which categorised this as a sexual assault], forced oral sex is a sexual assault with a maximum penalty of 14 years imprisonment, in other words, less than the maximum penalty for penetration by a finger or hand. This does not accord with many women's views of the relative seriousness of the conduct.[25]

For more information on the legislative history of these offences, see **Consultation Paper: Background**, section 3.4.

Assessing the relative seriousness of conduct following the 2000 reforms

The fact that all forms of non-consensual penetrative conduct falling within the offence of rape share the same maximum penalty of life imprisonment supports the view that it was not Parliament's intention that penetrative acts be viewed in a fixed hierarchy — for example, with penile–vaginal rape at one end being the most serious, and other forms of rape, formerly defined as types of 'sexual assault'/indecent assaults, such as digital–vaginal or digital–anal, at the other.

The maximum penalties that apply, however, indicate that some forms of sexual assaults, such as non-consensual acts of mouth–genital contact without additional circumstances of aggravation (armed or in company) are to be viewed as being of a lesser category of offence seriousness than penetrative acts captured within the offence of rape and sexual assault. They also suggest that non-aggravated forms of sexual assault, such as non-consensual forms of non-penetrative sexual touching, are generally to be viewed as less serious than the other forms of sexual assault and rape.

Introduction of sentencing reforms for 'serious violent offences'

Both sexual assault and rape are included in Schedule 1 of the PSA, to which the serious violent offences ('SVO') and cumulative sentencing (s 156A) schemes apply. Both schemes were introduced in 1997.[26]

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23 The Taskforce on Women and the Criminal Code, *Report of the Taskforce on Women and the Criminal Code* (February 2000) ('*Taskforce on Women and the Criminal Code Report*').
24 *Criminal Law Amendment Act 2000* (Qld) s 24.
25 *Taskforce on Women and the Criminal Code Report*, (n 23) 217.
26 *Penalties and Sentences (Serious Violent Offences) Amendment Act 1997* (Qld) ss 8 (inserting s 156A) and s 10 (inserting Part 9A into the PSA (n 18)). These changes came into effect on 1 July 1997.

The introduction of the SVO scheme reflected a government election commitment 'to introduce into the penalties and sentences legislation a section dealing with serious violent offences that reflects [its] concern for community safety as well as community outrage with this form of crime'.[27] It also referred to its concern that 'current sentences for serious offences have not had and are not having a sufficient deterrent effect' with reference to the growing numbers of people serving sentences of 10 years to less than life for serious offences within the schedule.[28]

If a court makes a declaration that a person is convicted of a serious violent offence, this means they must serve a minimum period of 80 per cent, or 15 years (whichever is less) of the sentence before being eligible for parole.[29] The declaration is mandatory in circumstances where the sentence imposed is 10 years or greater.[30]

Under section 156A of the PSA, if a person has been convicted of a Schedule 1 offence and the offence was committed while serving another prison sentence (including on parole), then the court must order any sentence of imprisonment for the new offence to be served cumulatively with any other term of imprisonment the person must serve or is currently serving (that is, one after the other).[31]

For more information on key legislative reforms impacting the sentencing of rape and sexual assault, see **Consultation Paper: Background**, Table 5.

Sentencing reforms signalling that offences against children are to be treated as more serious

Parliament has made several legislative changes and reforms over the past 20 years that can be viewed as reinforcing the assessed seriousness of these offences – in particular, offences against children. They include:

- **In 2003**, the introduction of special sentencing considerations for offences of a sexual nature committed in relation to a child under 16 years, including to provide that the principle of imprisonment as a sentence of last resort does not apply.[32]
- **In 2010**, the introduction of the requirement that if a person is sentenced for a sexual offence against a child, they 'must serve an actual term of imprisonment unless there are exceptional circumstances'[33] and the requirement for a court, in deciding whether to declare an offender convicted of a serious violent offence under the SVO scheme for offences that involved the use, or attempted use of violence against a child under 12 years, to treat the age of the child as an aggravating factor.[34]
- **In 2012,** the introduction of the repeat serious child sexual offence scheme, which requires a court to impose a mandatory life sentence (or indefinite sentence in the alternative) when

27 Queensland Legislative Assembly, *Parliamentary Debates*, 595 (Denver Beanland, Attorney-General).
28 Ibid 597.
29 See PSA (n 18) pt 9A.
30 PSA (n 18) ss 161A, 161B(1).
31 See ibid pt 9A, s 156A.
32 *Sexual Offences (Protection of Children) Amendment Act 2003* (Qld) s 28 inserting ss 9(5)–(6) into the PSA (n 18).
33 *Penalties and Sentences (Sentencing Advisory Council) Amendment Act 2010* (Qld) s 5 replacing s 9(5) of the PSA (n 18) and inserting a new s 9(5A) providing guidance to courts that, in deciding whether there are exceptional circumstances, a court may have regard to the closeness in age between the offender and the child.
34 Ibid s 7 inserting s 161B(5) into the PSA (n 18)). This also applies to offences that caused the death of a child under 12 years.

sentencing a person for an offence listed in Schedule 1A of the PSA (which includes rape and sexual assault – where a maximum penalty of life imprisonment applies) in circumstances where both the original offence and the repeat offence were committed in relation to a child under 16 years and the person who committed these offences was an adult, which also requires a person to serve a minimum non-parole period of 20 years under changes made to the *Corrective Services Act 2006* (Qld).[35]

- **In 2016**, the introduction of domestic violence as an aggravating factor was introduced in the PSA.[36] While not specific to child victims, it recognises the higher level of seriousness of child sexual abuse committed in a family situations which can occur 'for many years undetected and cause great harm to their own children, and other children within their extended families'.[37]
- **In 2020**, changes to provide that when sentencing a person for a sexual offence against a child under 16 years, a court 'must not have regard to the offender's good character if it assisted in committing the offence' and requiring a court to have regard to the sentencing practices, principles and guidelines applicable when the sentence is imposed rather than when the offence was committed.[38]

Why legislative reforms matter to sentencing

The High Court has acknowledged that a change in the maximum penalty can be of particular relevance as it suggests Parliament viewed previous penalties imposed as inadequate.[39] However, maximum penalties that historically have been fixed at a very high level, or more recently at a high 'catch-all level' may be of less relevance in a given case.[40]

The Queensland Court of Appeal has referenced these comments on several occasions. For example, in *R v Stable (a pseudonym)* ('*Stable*'),[41] the Court of Appeal, referring to these earlier statements of principle, concluded in the case of the offence of indecent treatment of children under 12 years that the effect of the 'substantial increases in the penalty from 14 years' imprisonment to 20 years' imprisonment' in 2003 was that:

> sentences that were imposed before 2003 must now be regarded as generally inadequate. This is because the penalties were increased by the amending legislation and, at the same time, a new basis for sentencing of such offences was introduced. Together, those two sets of changes to the statute law of sentencing demonstrated that the legislature regarded these offences as more serious than they had previously been thought.[42]

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35 *Criminal Law (Two Strike Child Sex Offenders) Amendment Act 2012* (Qld) ss 3 inserting a new s 181A into the *Corrective Services Act 2006* (Qld) and s 7 inserting new pt 9B into the PSA (n 18).
36 PSA (n 18) s 9(10A) unless there are exceptional circumstances. Inserted by *Criminal Law (Domestic Violence) Amendment Act 2016* (Qld).
37 See *R v MDZ* [2024] QCA 139 [16] (Dalton JA, Bradley and Hindman JJ).
38 *Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020* (Qld) s 53 inserting new ss 9(4) and 9(6A) into the PSA (n 31). These reforms were introduced following recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report: Executive Summary and Parts I to II* (Report, 2017) recs 74 and 76.
39 *Markarian v The Queen* (2005) 228 CLR 357, 372 [30] (Gleeson CJ, Gummow, Hayne and Callinan JJ), referring with approval to statements to this effect made in Eric Stockdale and Keith Devlin, *Sentencing* (Law Book Co of Australasia, 1987) [1.16]–[1.18].
40 Ibid.
41 *R v Stable (a pseudonym)* [2020] QCA 270 [37] ('*Stable*').
42 Ibid [38].

Referencing an earlier statement made by Fraser JA in *R v CBI*,[43] the Court said that 'it is to be expected that these changes would produce a general increase in the severity of sentences, rendering the earlier cases of little utility'.[44]

The impact of legislative reforms to the PSA on sentencing practices is discussed further in **Chapter 8**.

7.3 Evidence of alignment between sentencing outcomes and the community's and Parliament's views of offence seriousness

A disparity between current sentencing levels for an offence and the seriousness of that offence (as viewed by the community and Parliament) may be indicative of current sentencing practices not being adequate and appropriate.

7.3.1 Sentencing outcomes and community views

As discussed in section 7.3.1, community members who participated in the UniSC research exploring community views were asked to rank a series of paired scenarios to assess views on relative offence seriousness.

The Council matched these views of relative seriousness with sentencing outcomes to measure the extent to which outcomes were consistent with community rankings. Table 7.1 sets out our findings, which compare participant rankings with median sentencing levels in Queensland between 2020–21 and 2022–23.[45]

In most cases, the offence that most participants ranked as most serious also had the longest median custodial penalty. This suggests sentencing practices for these offences align with community views about the relative seriousness of these offences. However, there were some notable exceptions, with community members ranking some offences as more serious but the median sentence lengths being lower.

Ranking of rape conduct

Sentences imposed for the digital–vaginal rape of a child (DV offence) did not match community members' views about the offence's level of seriousness. Despite the digital–vaginal rape of a child being ranked by a majority of participants as more serious than any of the adult rape scenarios (including those involving penile–vaginal rape and in company offences (Pairs 1, 3 and 20), it had the lowest median term of imprisonment across all the adult rape scenarios used as a comparison (3.0 years).

An overwhelming majority of participants (85.4%) considered the digital rape of a child (DV offence) to be more serious than the penile–vaginal rape of an adult (non-DV offence) (Pair 1) despite sentences for the adult rape offence being considerably higher. There was a difference in the median sentences for those

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43 *R v CBI* [2013] QCA 186 [19].
44 *Stable* (n 41) [38].
45 The horizontal bar graph shows the proportion of the 89 participants who thought this offence was most serious within the pair of scenarios. The right-hand (blue) columns show the sentencing outcomes in Queensland between 2020–21 and 2022–23 for the scenarios, displaying the proportion of sentenced cases that had a custodial order imposed and the median custodial order length (years). The last column indicates whether the seriousness ranking within the pair matches the sentence outcome – 'yes' indicates the offence considered more serious within the pair also has the longer median custodial sentence, while 'no' indicates the offence considered more serious within the pair does not have the longer median sentence.

two case scenarios of about 3 years and 8.5 months (3.7 years) which suggests that if the child scenario was to be sentenced as more serious than the adult rape scenario, a much higher sentence would be imposed than is consistent with current sentencing practices.

Ranking of sexual assault conduct

Most participants (86.5%) also ranked the scenario involving aggravated sexual assault (non-consensual oral sex/fellatio performed by a teacher on a 16-year-old male student – a s 352(2) offence with a maximum penalty of 14 years' imprisonment) as more serious than sexual assault involving forced self-penetration with a sex-toy (s 352(3) offence with a maximum penalty of life imprisonment) (Pair 5). It was also ranked by about half of participants (49.4%) as more serious than strangulation in a domestic setting (Pair 14), which has a lower maximum penalty of 7 years. However, aggravated sexual assault (life) offences and strangulation both had longer median sentences imposed by the court of 2.5 years compared with 1.8 years for offences sentenced under s 352(2).

The majority of participants (74.2%) thought the non-aggravated sexual assault of an employee by their employer was more serious than burglary (Pair 7). However, burglary received a longer custodial sentence than non-aggravated sexual assault (median 1.3 years versus 0.8 years). Burglary was also more likely to attract a custodial sentence (79%) than non-aggravated sexual assault (64%). This finding suggests that the community may have viewed the sexual assault as more serious due to the physical and personal nature of the offence.

Ranking of offences involving death, serious physical injury or risk of death

Our analysis found discrepancies between the community views about the seriousness of the offence and the length of the custodial sentence imposed in Queensland courts in Pairs 17, 21 and 25 (see Table 7.1). In each of these scenario comparisons, the community thought the non-sexual offence was more serious than rape; however the median custodial sentence length was longer for the sexual offence.

Table 7.1: Seriousness of offence results from the University of the Sunshine Coast focus groups compared with the sentences imposed for these offences in Queensland (2020–21 to 2022–23)

Community view comparisons of seriousness of offence scenarios (n=89)			Sentencing outcomes in Queensland			Does the seriousness rank match the sentence outcome for each pair?
Pair #	Scenario number & offence description	Proportion most serious offence within pair *	N	% custodial orders	Median custodial sentence (years)	
1	8 Rape: digital (vaginal) child, niece (DV)	85.4%	24	100	3.3	No
	1 Rape: penile (vaginal), adult, stranger (not DV)	11.2%	23	100	7.0	
2	1 Rape: penile (vaginal), adult, stranger (not DV)	79.8%	23	100	7.0	Yes
	2 Rape: penile (anal), adult (DV)	14.6%	53	100	6.0	
3	8 Rape: digital (vaginal) child, niece (DV)	94.4%	24	100	3.3	No
	2 Rape: penile (anal), adult (DV)	1.1%	53	100	6.0	
4	8 Rape: digital (vaginal) child, niece (DV)	73.08%	24	100	3.3	Yes
	6 Sexual assault (agg): Teacher–student oral	22.5%	16	100	1.8	
5	6 Sexual assault (agg): Teacher–student oral	86.5%	16	100	1.8	No
	7 Sexual assault (agg life): Sex toy–vaginal	7.9%	2†	100	2.5	
6	7 Sexual assault (agg life): Sex toy–vaginal	66.3%	2†	100	2.5	Yes
	5 Sexual assault (non-agg): Employer-employee‡	30.3%	487	64	0.8	
7	5 Sexual assault (non-agg): Employer-employee‡	74.2%	487	64	0.8	No

Community view comparisons of seriousness of offence scenarios (n=89)				Sentencing outcomes in Queensland			Does the seriousness rank match the sentence outcome for each pair?
Pair #	Scenario number & offence description		Proportion most serious offence within pair *	N	% custodial orders	Median custodial sentence (years)	
	10	Burglary (at night)‡	21.3%	2,249	79	1.3	
8	6	Sexual assault (agg): Teacher–student oral	93.3%	16	100	1.8	Yes
	10	Burglary (at night)‡	3.4%	2,249	79	1.3	
9	11	Murder (DV)	66.3%	10	100	Life	Yes
	3	Rape, Penile (vaginal & anal) in company (not DV)	21.8%	8†	100	8.5	
10	11	Murder (DV)	74.2%	10	100	Life	Yes
	8	Rape: digital (vaginal) child, niece (DV)	21.3%	24	100	3.3	
11	2	Rape: penile (anal), adult (DV)	79.8%	53	100	6.0	Yes
	13	Common assault (Duncan)‡§	15.7%	4,511	21	0.5	
12	7	Sexual assault (agg life): Sex toy–vaginal	83.1%	2†	100	2.5	Yes
	13	Common assault (Duncan)‡§	11.2%	4,511	21	0.5	
13	14	Strangulation (DV)	87.6%	839	100	2.5	Yes
	5	Sexual assault (non-agg): Employer-employee‡	6.7%	487	64	0.8	
14	6	Sexual assault (agg): Teacher–student oral	49.4%	16	100	1.8	No
	14	Strangulation (DV)	44.9%	839	100	2.5	
15	12	Dang op vehicle GBH (speeding & alcohol)	56.2%	56	100	4.6	Yes
	6	Sexual assault (agg): Teacher–student oral	38.2%	16	100	1.8	
16	12	Dang op vehicle GBH (speeding & alcohol)	86.5%	56	100	4.6	Yes
	5	Sexual assault (non-agg): Employer-employee‡	11.2%	487	64	0.8	
17	12	Dang op vehicle GBH (speeding & alcohol)	66.3%	56	100	4.6	No
	2	Rape: penile (anal), adult (DV)	27.0%	53	100	6.0	
18	1	Rape: penile (vaginal), adult, stranger (not DV)	87.6%	23	100	7.0	Yes
	7	Sexual assault (agg life): Sex toy–vaginal	7.9%	2†	100	2.5	
19	3	Rape: penile (vaginal & anal) in company (not DV)	52.8%	8†	100	8.5	Yes
	9	Intention to cause GBH (DV)	41.6%	14	100	6.3	
20	3	Rape: digital (vaginal) child, niece (DV)	48.3%	24	100	3.3	No
	8	Rape: penile (vaginal & anal) in company (not DV)	47.2%	8†	100	8.5	
21	9	Intention to cause GBH (DV)	64.0%	14	100	6.3	No
	1	Rape: penile (vaginal), adult, stranger (not DV)	30.3%	23	100	7.0	
22	9	Intention to cause GBH (DV)	84.3%	14	100	6.3	Yes
	14	Strangulation (DV)	10.1%	839	100	2.5	
23	12	Dang op vehicle GBH (speeding & alcohol)	91.0%	56	100	4.6	Yes
	10	Burglary (at night)‡	5.6%	2,249	79	1.3	
24	2	Rape: penile (anal), adult (DV)	52.8%	53	100	6.0	Yes
	4	Rape: digital (vaginal) (not DV)	40.4%	47	100	3.0	
25	14	Strangulation (DV)	62.9%	839	100	2.5	No
	4	Rape: digital (vaginal) (not DV)	29.2%	47	100	3.0	
26	4	Rape: digital (vaginal) (not DV)	82.0%	47	100	3.0	Yes
	13	Common assault (Duncan)‡§	14.6%	4,511	21	0.5	

Data notes: Sentencing outcomes in Queensland – MSO, sentenced as adults, higher and Magistrates Courts, 2020–21 to 2022–23
Sources: Community views on rape and sexual assault offences, University of the Sunshine Coast, and Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.
Information in the rape cases regarding victim (adult/child), type of conduct, and victim-offender relationship was manually coded from sentencing remarks received from Queensland Sentencing Information Service.

* some participants did not provide a response to all scenario pairs presented. These responses were included in the analysis but are not shown.
† This sample size is small. Caution should be used when interpreting these results.
‡ these offences include sentences imposed in the higher courts and Magistrates Courts combined.
§ sentencing data could not identify cases where the victim was a stranger to the offender. Cases where the offence was a DFV offence have been excluded as these have been identified as having a known relationship. However other non-DFV victim-offender relationships remain in the data.

7.3.2 Sentencing outcomes and Parliament's views of seriousness

Challenges in assessing adequacy based on maximum penalties

As discussed in section 7.2.3, the same maximum penalties apply to a wide range of offences, including rape and some forms of aggravated sexual assaults. Many sentencing reforms apply not only to the offences of sexual assault and rape, but also to other sexual offences and non-sexual violent offences.

For these reasons, maximum penalties and sentencing reforms cannot be relied on as the sole determinant of adequacy.

In practice, researchers have found that 'the ordering of crimes according to the severity of their statutory maximum penalties bears little relationship to their ranking according to the sentences actually imposed by the courts'.[46] This is because courts must take into account the individual circumstances of the person being sentenced and the offence, taking into account that maximum penalties are reserved for the 'worst category' of offending.[47]

On some occasions, courts have pointed to the maximum penalty as a basis for finding that sentencing outcomes are not appropriate. For example, in *Director of Public Prosecutions v Dalgliesh (a pseudonym)* ('*Dalgliesh*'),[48] the High Court supported the view of the Victorian Court of Appeal that the current sentencing range for incest in Victoria reflected 'a disregard of the gravity of the offending as indicated by the maximum sentence prescribed for the offence' as well as the moral culpability of the offender in that particular case as 'clearly correct'.[49] The Victorian Court of Appeal in reaching this finding had considered 12 cases of incest involving pregnancy, for which the range of sentences was 4 to 7 years' imprisonment.[50] The High Court noted that the range of sentences 'pays scant, if any, regard to the maximum penalty prescribed for the offence of incest' which had increased in September 1997 from 20 years' imprisonment to 25 years' imprisonment.[51]

Median and maximum sentences compared with maximum penalties

As discussed in **Appendix 4**, sentencing outcomes for rape and sexual assault vary across a wide sentencing range, and sentence lengths tend to vary by offence and conduct type in particular.

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46 Richard Fox and Arie Frieberg, 'Ranking Offence Seriousness in Reviewing Statutory Maximum Penalties' (1990) 23(3) *Australian and New Zealand Journal of Criminology* 165, 170.
47 See *R v Kilic* (2016) 259 CLR 256, 265–6 [18]–[19]. Both the nature of the crime and circumstances of the person being sentenced are to be considered in determining whether an offence falls within this category.
48 *Director of Public Prosecutions v Dalgliesh (a pseudonym)* (2017) 262 CLR 428.
49 Ibid [53].
50 *Director of Public Prosecutions v Dalgliesh (a pseudonym)* [2016] VSCA 148, [25]–[39] (Kiefel CJ, Bell and Keane JJ).
51 *Dalgliesh* (n 49) [11]. See also *DPP v Maynard* [2009] VSCA 129, in which the Victorian Court of Appeal pointed to the fact that a 4-year sentence of imprisonment for a rape offence 'was only 16% of the available maximum' of 25 years as a basis for concluding the sentence in that case 'does not accord with current sentencing practices for such a serious example of the offence': [41].

The Council examined the median and maximum actual sentences received for sexual assault and rape over the 18-year period as a proportion of the maximum penalties, noting that a similar approach was taken by the Victorian Sentencing Advisory Council ('VSAC') in its 2016 Sentencing Guidance review.[52]

Assessing median imprisonment lengths as a proportion of the maximum penalty is an imperfect exercise, given that a life sentence has no numerical value and the custodial component can be for a person's natural life if parole is never applied for or granted. We assigned life imprisonment a nominal value of 30 years, as this is the highest-non parole period prescribed.[53]

As shown in Table 7.2, median sentences for rape and sexual assault ranged from just 8.3 per cent of the maximum penalty (for aggravated sexual assault (life) offences) to 16.7 per cent for rape and non-aggravated sexual assault where sentenced in the Magistrates Courts (based on the courts' 3-year jurisdictional limit).[54]

Rape was the only offence for which the maximum penalty was imposed during the data period.[55] The longest sentence for non-aggravated sexual assault in the Magistrates Courts, however, corresponded with the courts' 3-year jurisdictional limit.[56] A sentence representing 70 per cent of 10-year maximum penalty was also imposed for non-aggravated sexual assault sentenced in the higher courts.

Aggravated sexual assault (life) offences had the lowest maximum sentence applied, considered as a percentage of the maximum penalty.

Table 7.2: Median and longest custodial sentence lengths for rape (MSO) and sexual assault (MSO) as a percentage of the maximum penalty/sentence 2005–06 to 2022–23

Offence	Median	Median as % of max penalty/ sentence	Longest penalty imposed	Longest penalty imposed as % of max penalty/ sentence
Rape (s 349)	5.0	16.7	Life	100.0
Aggravated sexual assault (s 352(3))	2.5	8.3	6.0	20.0
Aggravated sexual assault (s 352(2))	1.5	10.7	3.8	27.1
Non-aggravated sexual assault (s 352(1) – higher courts)	1.0	10.0	7.0	70.0
Non-aggravated sexual assault (s 352(1) – Magistrates Courts)	0.5	16.7	3.0	100.0

52 Sentencing Advisory Council (Victoria), *Sentencing Guidance in Victoria* (Report, 2016) 74–76.
53 *Criminal Code* (Qld) s 305(2).
54 Ibid s 552H. This applies unless the Court is imposing a drug or alcohol treatment order, in which case a sentence of up to 4 years' imprisonment can be imposed: ibid s 552H(1)(a). Also, a Magistrates Court must abstain from dealing summarily with a charge if satisfied that because of the nature or seriousness of the offence or any other relevant consideration the defendant, if convicted, may not be adequately punished on summary conviction: s 552D.
55 Over the 18-year data period, 7 rape cases (MSO) received a life sentence. Of those, 4 were due to the mandatory operation of the repeat serious child sex offence scheme, PSA section 161E and 2 had the life sentence for rape removed on appeal. See Appendix 4 for details.
56 *Criminal Code* (Qld) s 552H. Note that a Magistrates Court is not permitted to deal with a charge if satisfied that if because of the nature or seriousness of the offence or any other relevant consideration, the defendant, if convicted, may not be adequately punished on summary conviction: ibid s 552D(1).

Notes: 1. Offences with a maximum penalty of life imprisonment assigned a 30-year nominal term 2. Non-aggravated sexual assault calculations based on a maximum 3-year sentence for offences sentenced in the Magistrates Courts (Criminal Code (Qld) s 552H).
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

Median sentences for these offences aligned with the ordinal ranking of current maximum penalties, noting the following:

- Rape, which has a maximum penalty of life imprisonment, had the longest median custodial sentence (5.0 years), followed by aggravated sexual assault (life) offences (2.5 years).
- Aggravated sexual assault offences with a maximum penalty of 14 years' imprisonment had the next highest median penalties (1.5 years).
- Non-aggravated sexual assault, which has a maximum penalty of 10 years' imprisonment, had the lowest median sentences (1.0 years for cases sentenced in the higher courts and 0.5 years for cases sentenced in the Magistrates' Courts).

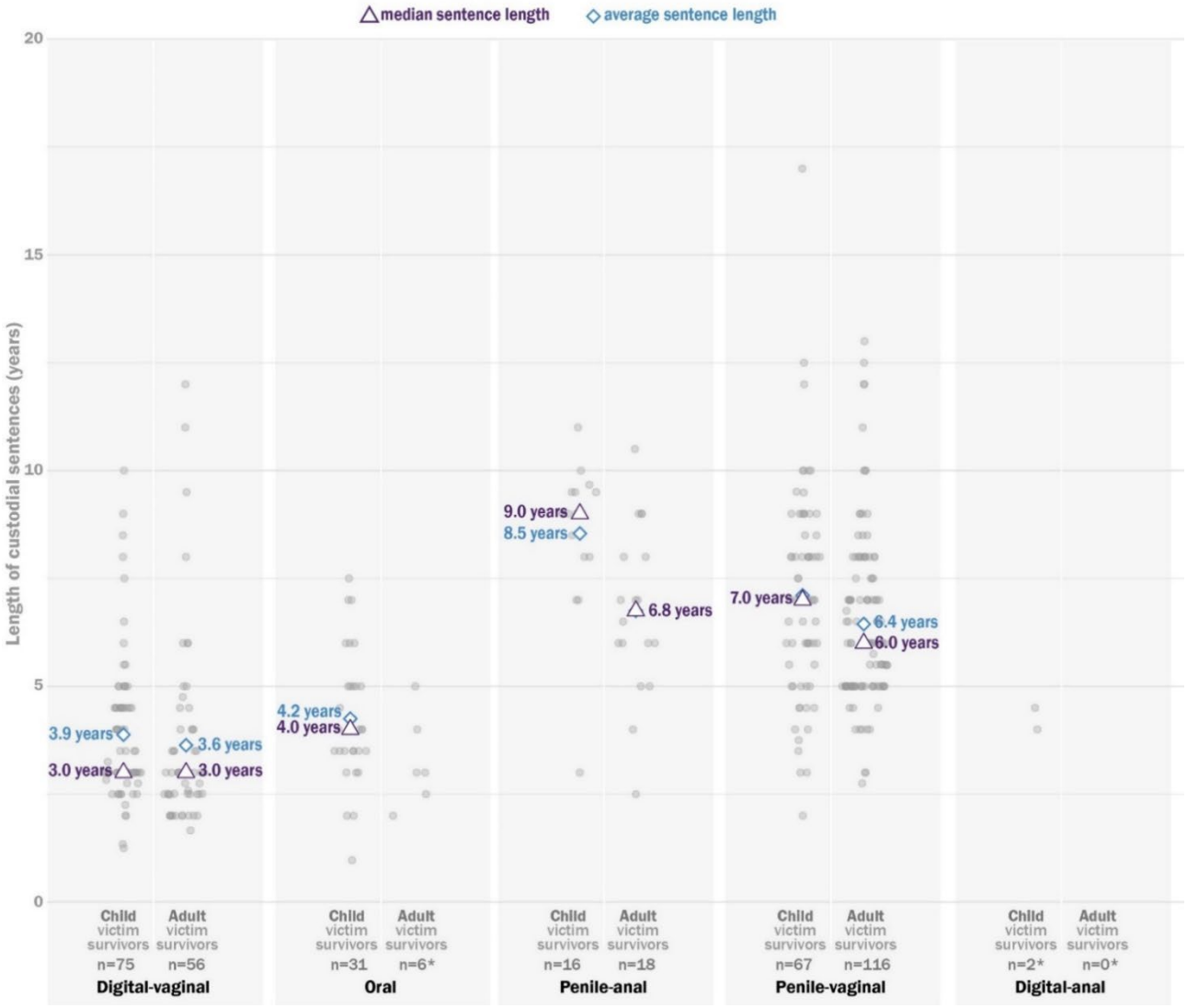
Beyond this observation, it is not possible to draw any conclusions from this analysis. This is because the same limitations apply to use of the maximum penalty as a guide to offence seriousness more generally, taking into account it is reserved for the worst category of offending, and both rape and sexual assault occur in a wide spectrum of circumstances. A low median as a proportion of the maximum penalty may simply reflect that fact.

Sentencing practices for different forms of sexual penetration

As discussed in section 7.2.3, one maximum penalty (life imprisonment) applies to all forms of penetration captured within the offence of rape. There is no suggestion in the framing of the offence of rape that different types of conduct captured within this offence should be viewed differently from other types of conduct.

Despite this, our analysis has found that sentencing outcomes generally 'cluster' at different levels based on the type of penetration involved – for example, digital–vaginal rape of an adult clustered around the 3-year mark, while penile–vaginal rapes clustered around the 6-year mark (see Table 7.1).

Figure 7.1: Length of custodial sentences by type of rape and age of victim survivor (MSO)



In **Chapter 6**, we note that the differential treatment of penetration types is occurring despite Court of Appeal guidance to the contrary that conduct type alone does not in itself determine offence seriousness.

Sentencing practices for different forms of sexual assault conduct

While we also found differences in sentencing practices for non-aggravated sexual assault based on conduct type, from our review of sentencing remarks and other evidence gathered, we did not find the same clear distinctions between assessed levels of seriousness based on conduct type alone, with a broader range of factors generally considered. This is consistent with views expressed in our subject matter expert interviews (see section 6.5.3, **Chapter 6**).

When sentencing outcomes were analysed by conduct type alone rather than the context of the offending, we found the following:

- Offending involving skin-to-skin ('on skin') contact was more likely to result in a custodial penalty (predominantly a wholly suspended prison sentence), depending on whether the conduct involved touching of the genitals (73.7%) or another body part (75.0%). The exception was where the on-skin contact involved the perpetrator putting their mouth to a non-genital body region (e.g. kissing

a person's breast, lips, face, neck or hand), in which 55.6 per cent of cases resulted in custodial sentences.

- Over-clothes sexual assaults resulted in custody in 58.8 per cent of cases involving touching of a person's genitals, and 49.1 per cent of cases involving other body parts.
- Custodial penalties were longer on average for offences involving touching of the genitals, whether over or under clothing (with under clothing 'on-skin' offences resulting in the longest median sentences):
    - when the indecent touching involved the touching of a person's genitals, on skin offending resulted in a median sentence length of 1.0 years, compared to 0.8 years for touching a person's genitals over clothing;
    - for indecent touching that involved touching another body part, on skin offending resulted in a median sentence of 0.8 years compared to 0.5 years for over clothes offending.

For more information, see **Appendix 4**.

7.3.3 Victim age and sentencing outcomes

The legislative reforms made by Parliament, including under sections 9(4)–(6) of the PSA (discussed in **Chapter 8**), have been designed with the intention of ensuring that sexual offences against children 'are recognised as offences equating in seriousness to offences of violence'.[57] The community's view is that offences against children are more serious.

The Council undertook a separate analysis of outcomes for rape (MSO) by victim age to test whether these offences are being treated as more serious based on sentencing outcomes.

Based on an analysis of cases sentenced during the three-year period between 1 July 2020 to 30 June 2023, we found rape cases with an adult victim survivor had a median custodial sentence that was 9 months longer than cases where the victim survivor was a child (5.5 years compared with 4.8 years, respectively).

However, once the penetration type was controlled for, these trends were reversed. Within a penetration category, cases involving a child victim survivor generally resulted in sentences that were the same length, or longer compared to cases involving an adult victim survivors. For example:

- digital-vaginal rape of a child had a median custodial sentence of 3.0 years, which was the same median custodial sentence for digital-vaginal rape of an adult; and
- penile-vaginal rape of a child had a median of 7.0 years, compared to penile-vaginal rape of an adult, which had a median sentence of 6.0 years.

The higher sentences imposed for child rape cases for some types of conduct suggest courts are sentencing consistently with the community's and Parliament's views of offence seriousness by, in general, treating offences against children as being more serious than the same offences committed against adults.

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[57] Explanatory Notes, Sexual Offences (Protection of Children) Amendment Bill 2002 (Qld) 7.

However, based on the UniSC study, the extent to which the higher level of seriousness of child rape is reflected in sentencing outcomes in terms of increased sentence lengths would appear to be insufficient.

Significantly, despite substantive changes in child sexual offence legislation and our understanding of the harm caused by these offences to children, sentencing practices have not sufficiently shifted. For example, a 3-year sentence of imprisonment for digital-vaginal rape of a child by her father was upheld by the Court of Appeal in a 1997 decision, aligning with current median of 3.0 years for the same offence.[58]

The higher ranking of the case scenario involving aggravated sexual assault by a teacher on a child (which carries a 14-year maximum penalty) than the aggravated sexual assault (life) and strangulation in a domestic setting scenario is further evidence that the community expects sexual assault offences involving older adolescent children (aged 16 to 17 years) to attract higher penalties.

The UniSC findings are consistent with views of the Queensland community in ranking crime harm, given that child sexual abuse was ranked as the second most serious offence in the Crime Harm Index based on a weighted score.

7.4 How sentencing outcomes for sexual assault and rape compare with other offences

As another measure of the appropriateness and adequacy of sentencing outcomes for rape and sexual assault, we also compared sentencing outcomes for these offences with outcomes for other offences.

The comparator offences selected vary in seriousness, maximum penalty and whether they involve personal violence, property or drug-related harms. Several offences were chosen because they align with offences selected by UniSC as part of its focus group research for this review. For more information see **Appendix 4**.

As 'there are no widely agreed metrics to use in scaling [offence] seriousness or punishment severity',[59] comparing offence outcomes is a limited tool to assess offence seriousness.

Generally, it is suggested, the penalties that attach to particular forms of criminal wrongdoing should be 'scaled to the degree of wrongdoing' involved in the offence, thereby reinforcing prevailing norms of acceptable behaviour.[60] For example, a sexual assault should be punished more severely than a minor property offence. Beyond this, developing comprehensive scales of offence seriousness that are then matched to penalties as part of a discretionary sentencing exercise is a virtually impossible exercise, given the multiplicity of circumstances in which offences are committed and their differential impacts.[61]

Using administrative data also has limitations, as we cannot control for factors including whether the person's conviction due to them pleading guilty or being found guilty following a trial, the number of offences involved in specific cases and the seriousness of individual examples of offending within these

58 *R v P* [1998] 2 Qd R 191.
59 Michael Tonry, 'Proportionality Theory in Punishment Philosophy: Fated for the Dustbin of Otiosity?' in Michael Tonry (ed), *Of One-eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford University Press, 2019), referring to Emile Durkheim's observations on the role of the legal system in reinforcing important norms and values.
60 Michael Tonry, 'Doing Justice in Sentencing' (2021) 50 *Crime and Justice* 1, 10.
61 For a discussion of these challenges, see Tonry (n 59).

broad offence categories, the number of victims involved, or whether the person had a prior history of offending.

Despite the limitations of this analysis, it illustrates how rape and sexual assault are sentenced in comparison with other offences. The differences in the use of sentencing orders and lengths can provide a useful guide as to how 'serious' different types of offences are viewed. Generally, the more intrusive, restrictive or onerous the sentence type and conditions, the more severely a penalty is viewed.

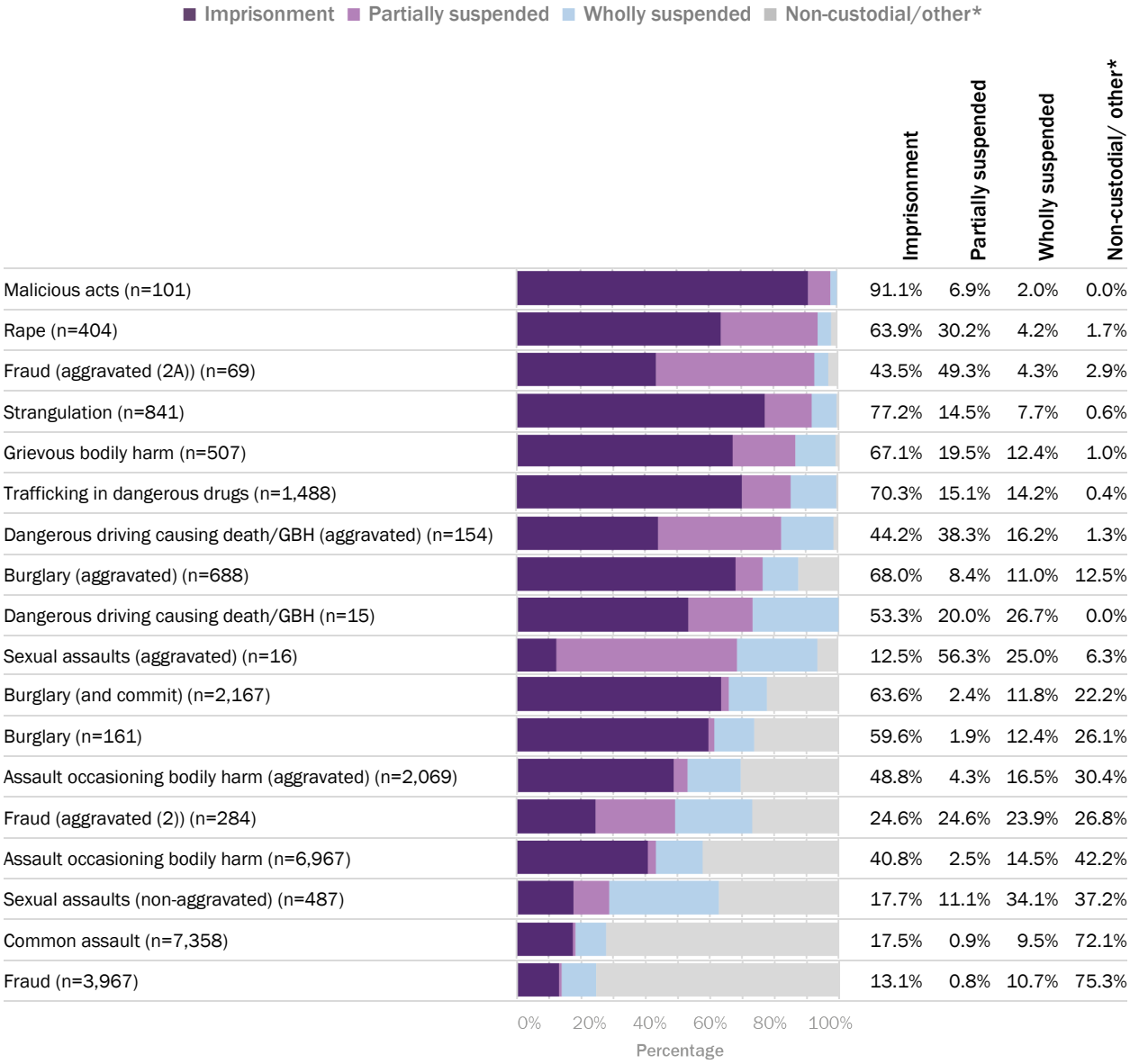
Comparisons based on the relative severity of penalties is complex because of the challenges in commensurability. For example, there is no direct equivalence between days spent in custody versus time spent subject to conditions under a probation order or the dollar value of a fine.[62] An attempt to rank the relative severity of penalties based on type also fails to take account of how these penalties impact the individual being sentenced, which may depend on their personal circumstances.

There are also differences in the penalty types considered by a court to be appropriate to meet the purposes of sentencing. For example, if the objective is community protection, then a fine is unlikely to be particularly effective unless there is evidence of its specific deterrent effect (see **Chapter 11**).

With these limitations in mind, we identified differences in the use of different penalty types based by offence (see **Chapter 11**).

62 Note, however, that there are some limited contexts in which this is sought to be quantified. See, for example PSA (n 18) s 69 regarding fine option orders, which cap the number of community service hours for each penalty unit, and s 182A regarding imprisonment in lieu of payment of a fine.

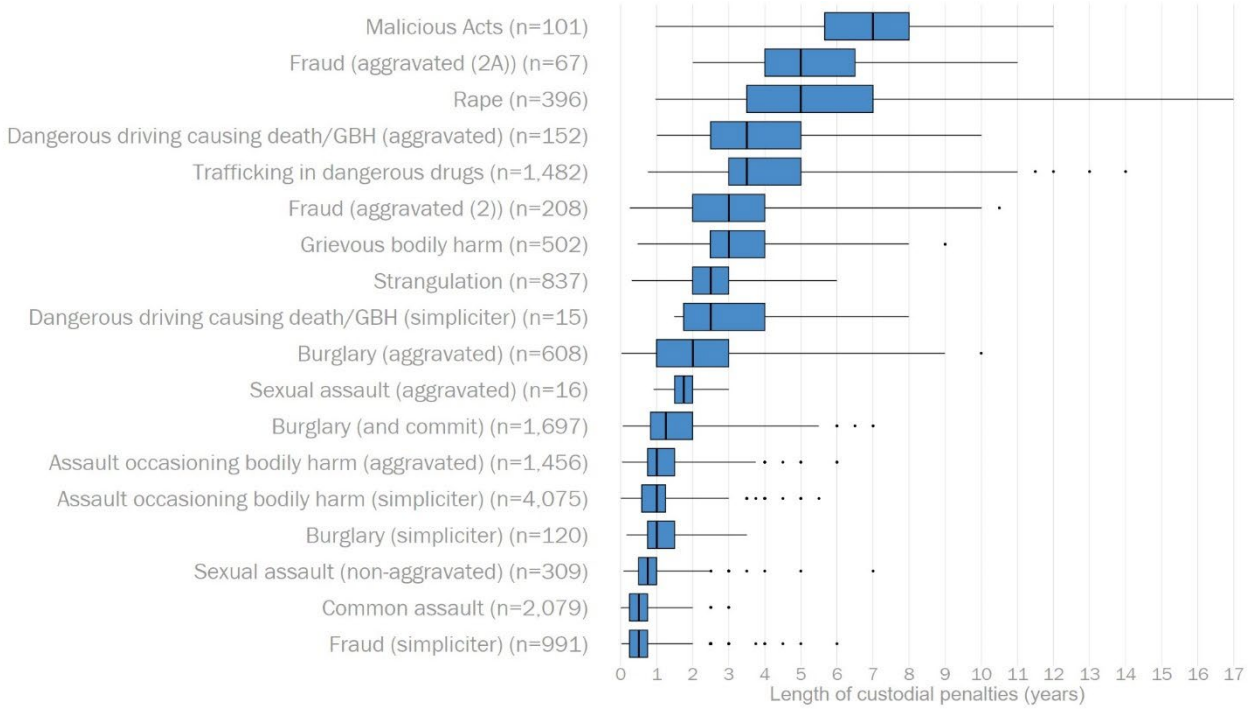
Figure 7.2: Proportion of sentenced cases by penalty type (MSO), comparator offences, 2020–21 to 2022–23



Data notes: includes cases (MSO) sentenced from 2020–21 to 2022–23. Imprisonment includes combined prison-probation orders.
Cases sentenced for aggravated sexual assault under s 352(3) where the maximum penalty is life imprisonment were not included due to the small number of cases sentenced (n=2).
* 'Other' includes a small number of custodial orders of intensive correction orders and rising of the court. The values above are sorted in descending order based on the time spent in actual custody (defined as a period of imprisonment or the proportion of a partially suspended prison sentence in which the person was required to serve before the sentence was suspended).
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023.

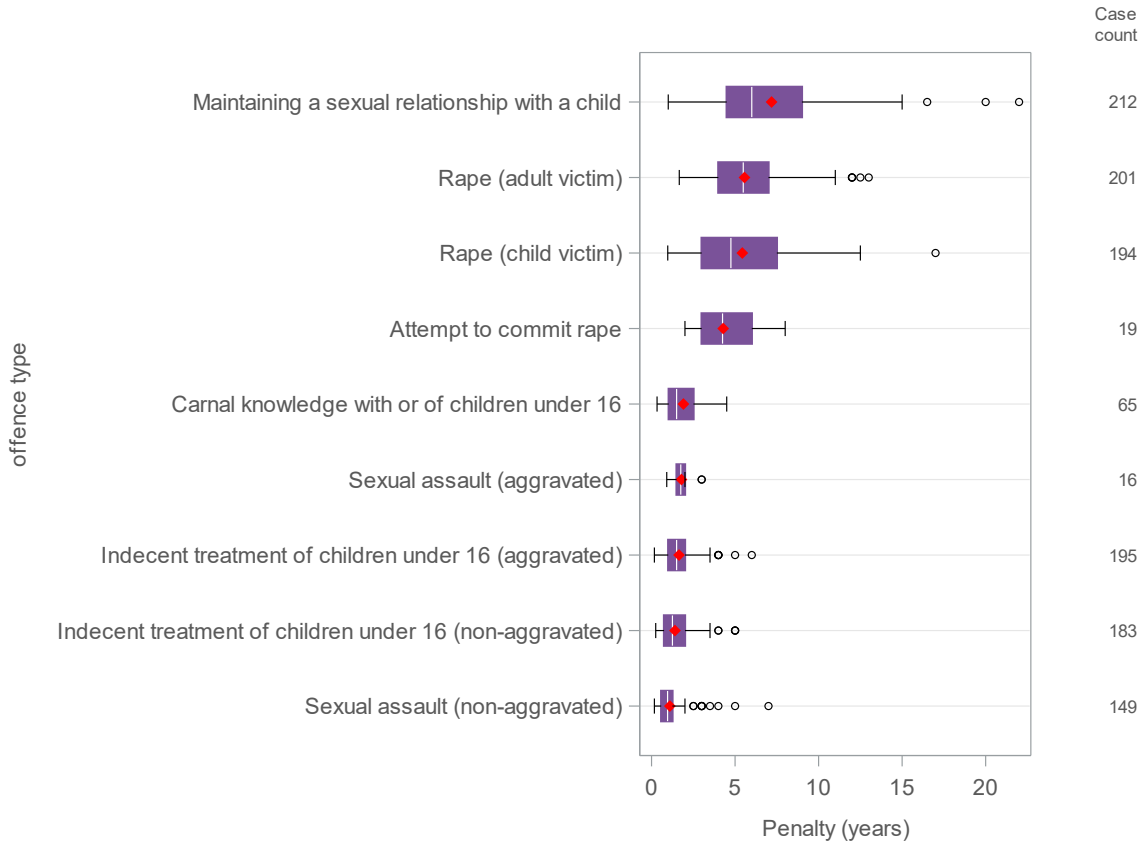
The Council also compared penalty lengths for rape and sexual assault with select non-sexual offences (Figure 7.3) and sexual offences (Figure 7.4) during the 3-year data period (1 July 2020–30 June 2023). Life sentences were excluded from this analysis.

Figure 7.3: Distribution of length of custodial orders (MSO), comparator offences, 2020–21 to 2022–23



Data notes: includes cases (MSO) sentenced from 2020–21 to 2022–23. Box plots exclude life sentences. Sexual assault (aggravated) and sexual assault (aggravated life) have not been presented due to small sample sizes.
Custodial sentences included in this figure include sentences of imprisonment (including suspended imprisonment and combined prison-probation orders), and intensive correction orders. Sentences of rising of the court are not included.
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023, updated April 2024.

Figure 7.4: Custodial sentence lengths for Australian Standard Offence Classification (ASOC) 031 sexual assault (MSO) sentenced in the higher courts, July 2020 to June 2023



Data notes: Custodial orders for ASOC subdivision 031 'Sexual assault', MSO, adults, higher courts, 2020–21 to 2022–23. Life sentences for maintaining a sexual relationship with a child (n=4) and for rape (n=1) are excluded from this figure. Offences with less than 10 cases receiving a custodial order are excluded from this analysis - Attempts to procure commission of criminal acts, [Cth] Child sex offences outside Australia, [Repealed] Unlawful sodomy, Assault with intent to commit rape, Sexual assault (aggravated life), Incest, and Abuse of persons with an impairment of the mind,
Source: Queensland Government Statistician's Office, Queensland Treasury - Courts Database, extracted September 2023, updated April 2024.

The following is a high-level summary of our findings about how sentencing outcomes for sexual assault and rape compare with those for other offences. More information can be found in **Appendix 4**.

7.4.1 Rape

Comparative sentencing outcomes for rape, sexual assault and select non-sexual offences

Based on our analysis of sentencing outcomes, we observed that compared to sexual assault and 15 other select non-sexual offences, rape:

- **ranked 2nd based on the use of custodial orders and average custodial sentence length**; the offence of Acts intended to cause grievous bodily harm and other malicious acts ('malicious acts') ranked first;
- **had the broadest range of custodial sentence length distribution**, potentially reflecting the wide range of circumstances involved in this form of offending;

- **ranked fourth for use of partially suspended prison sentences as a proportion of all penalties imposed** with sexual assault (aggravated) ranked first,[63] followed by fraud (aggravated 2A) and dangerous driving causing death/GBH;
- **Ranked sixth for use of imprisonment orders, as a proportion of all sentences**. The offences of malicious acts, strangulation, grievous bodily harm, drug trafficking and burglary (aggravated) all ranked higher.

These findings suggest that rape sentences are more varied compared with other select non-sexual offences, potentially reflecting the wide range of conduct in this type of offending. It also shows the use of partially suspended prison sentences is high in comparison to other offences examined. Some offences with a lower maximum penalty had a higher proportion of imprisonment orders (such as strangulation, grievous bodily harm and drug trafficking).[64]

Comparative sentencing outcomes for rape and select sexual offences

We also compared rape (child victim) and rape (adult victim) outcomes for 5 sexual offences over the same 3-year data period used for the above analysis and found the following:

- Rape (child victim) ranked second based on the use of custodial orders and third for average sentence length.
- Rape (adult victim) ranked third for custodial order use and second for average sentence length.
- The use of partially suspended prison sentences was high across all sexual offences analysed.[65]

7.4.2 Sexual assault

Comparative sentencing outcomes for sexual assault, rape and select non-sexual offences

When comparing penalty outcomes for sexual assault with rape and 15 non-sexual offences we found the following: [66]

- Aggravated sexual assault ranked tenth for custodial order use as a proportion of all sentences, and eleventh for average custodial sentence length.
- Aggravated sexual assault ranked first for use of partially suspended prison sentence use, as a proportion of all sentences imposed.
- Non-aggravated sexual assault ranked sixteenth for custodial order use as a proportion of all sentences and fifteenth for average custodial sentence length.
- Non-aggravated sexual assault ranked first for wholly suspended prison sentence use and eleventh for partially suspended prison sentence use as a proportion.

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63 Although this involved only 16 cases, meaning these findings should be interpreted with caution.
64 The maximum penalty for trafficking in dangerous drugs increased to life imprisonment in May 2023: *Police Powers and Responsibilities and Other Legislation Amendment Act (No 2) 2023* (Qld) s 4.
65 Partially suspended prison sentences accounted for just over one quarter of penalties imposed for rape of a child (26.2%) and repeated sexual conduct with a child (formerly 'maintaining a sexual relationship with a child') (25.5%), to just over a third of all penalties for rape of an adult (34.3%) and closer to half of penalties for aggravated indecent treatment of a child under 16 offences (46.1%).
66 Although this involved only 16 cases, meaning these findings should be interpreted with caution.

The high use of wholly and partially suspended prison sentences may be due in part to a court's inability to set a parole release date, which is discussed further in **Chapter 11**.

Comparing sentencing outcomes for sexual assault with outcomes for assaults occasioning bodily harm

For cases sentenced in the higher courts, the median custodial sentence length for assaults occasioning bodily harm ('AOBH') was one year, which was higher than for non-aggravated sexual assault (9 months) and common assault (0.5 years).

For cases finalised in the Magistrates Courts, AOBH (simpliciter and aggravated) attracted longer custodial sentences than non-aggravated sexual assault cases (one year compared with 0.5 years respectively).

These findings could suggest that current sentencing practices place greater weight on physical harm than psychological or emotional harm, thereby giving rise to more custodial penalties and longer sentences for AOBH than for non-aggravated sexual assault.

This analysis, however, does not take into account the type of conduct involved. In our select sentencing remarks analysis (n=75)[67] we found that a higher proportion of cases involving indecent touching under clothing/on skin (up to 75.0%) received custodial sentences and the median sentences for this conduct was also higher (the highest median being 1.0 years where the touching was of genitals). This outcome aligns with the median AOBH outcome, suggesting courts may be treating touching under clothing/on skin in a similar way to physical harm (although we do not know the conduct involved in the AOBH cases).

Further, due to the large number of case-specific and defendant-specific factors that are not accounted for, including the number of offences the person was sentenced for, relevant history of prior offending, age and the context of the offending, no conclusions can be drawn from this analysis.

Comparative sentencing outcomes for sexual assault and select sexual offences

The Council's comparison of sexual assault (non-aggravated) sentenced with 5 sexual offences sentenced in the higher courts during the 3-year data period found it:

- **had the lowest proportion of imprisonment sentences** (13.7%) compared with other sexual offences;
- **had the highest proportion of wholly suspended prison sentences** (44.7%) compared with other sexual offences.

The Council also compared sentencing outcomes for non-aggravated sexual assault sentenced in the Magistrates Court with select sexual and non-sexual offences that had similar conduct/seriousness or maximum penalties.[68] This analysis found that both forms of AOBH (both non-aggravated and aggravated)

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67 See Chapter 4 and Appendix 5 for the methodology used for this analysis.

68 AOBH which has a 7-year maximum penalty, or up to 10 years if a circumstance of aggravation applies; burglary (aggravated) and burglary (commit an indictable offence)– both of which have a maximum penalty of life imprisonment; carnal knowledge with child under 16 years (now called engaging in penile intercourse with a child under 16) which has a 14-year maximum penalty, or life imprisonment if committed in certain circumstances – for example, the child is a person with an impairment of the mind; common assault, which has a 3-year maximum penalty, Common assault now includes circumstances of aggravation which increases the maximum penalty to 4 years if a circumstance of aggravation applies.

attracted a greater proportion of custodial penalties[69] than non-aggravated sexual assault, and a smaller proportion of monetary penalties, despite having similar maximum penalties.

More detailed findings are presented in **Appendix 4**.

7.4.3 Consultation views

Submissions and consultation events

While we did not ask a specific consultation question regarding views about how sentencing outcomes for sexual assault and rape compare with other offences, we did receive some feedback in relation to this aspect.

At the Brisbane Consultation Event, some participants thought rape and sexual assault should be treated with a higher level of seriousness than drug trafficking on the basis that sexual offences are more likely to cause trauma.[70] A related view was expressed in the Cairns Consultation Event, with some participants commenting on the jurisdictions of the courts and what this communicated in terms of offence seriousness.[71] Participants queried why drug trafficking is dealt with by the Supreme Court, while rape cases are dealt with by the District Court. For victim survivors, this is often the worst thing they have experienced, and the court level may make them feel like the harm caused to them is less important than drug trafficking.

Subject matter expert interviews

Some SME participants were asked for their views on the seriousness of sexual assault and rape offences compared with other types of offences. One participant considered that, in their experience, fraud and drug trafficking offences can receive higher sentences in contrast to sexual assault and rape, which may lead to victim dissatisfaction and a perception that the sentence was inadequate. [72] The same person also considered that victims can be frustrated because sentences for rape and sexual assault are 'nowhere near the maximum penalties', given the 'sense of violation that's involved'.

Another participant thought there was a discrepancy between the sentencing for drug offences and indecent treatment of a child offences, with the former often receiving longer periods of imprisonment.[73]

7.5 Problems with the assessment of objective seriousness of sexual assault and rape offences

As discussed in **Chapter 6**, Queensland courts are required to take account of the nature of the offence and how serious it was, and the extent to which the offender is to blame for the offence under section 9(2) of the PSA. These provisions require a court to assess the harm and culpability that inherently exist in the offence and are part of the objective elements of the offence. The court's assessment and categorisation of an offence in terms of its objective seriousness are therefore integral to the sentencing

69 Includes imprisonment, partially and wholly suspended prison sentences.
70 Brisbane Consultation Event, 11 March 2024, .
71 Cairns Consultation Event, 21 March 2024.
72 SME Interview 15.
73 SME Interview 17.

process.[74] This is why the Council included this criterion as a relevant measure of assessing adequacy of the current Queensland sentencing approach.

The Council's analysis has identified 3 issues relating to the objective seriousness of sexual assault or rape and the court's assessment of offending conduct that may be affecting current sentencing practices.

7.5.1 All types of penetrative rape conduct are objectively serious

In **Chapter 6** and **Chapter 8**, we comment in some detail about problems highlighted by the Court of Appeal regarding what we consider to be the unhelpful categorisation of rape conduct and forms of penetrative acts into different levels of offence seriousness.

Legal stakeholders advised the Council that the type of rape was highly relevant in assessing where on the spectrum of gravity an individual case falls, with participants suggesting a hierarchy of offending, with digital and oral penetration (both with tongue and penis) on the low end of the scale and penile penetration of a vagina or anus at the high end.

Evidence of this categorisation is illustrated by the 'clustering' of sentencing outcomes based on the type of penetrative conduct alone (see **Appendix 4**). The Council's analysis found the median sentence length for rape (MSO) varied substantially when the type of rape was considered with acts of penile–anal and penile–vaginal having the highest average and median sentence lengths and digital–vaginal penetration the lowest.

Some SME interview participants thought not enough weight was being given to the objective seriousness of digital and oral rape, particularly when an offender commits penile–oral rape), with the comment that 'sentencing outcomes do not adequately reflect 'the offensive nature of it and the demeaning aspect of it'.[75]

7.5.2 Offences against children are objectively more serious than similar offences against adults

In **Chapter 6**, the Council finds that due to the vulnerability of children, sexual violence offences committed against children were objectively more serious than similar offences committed against adults. This is due to the inherently wrongful nature of the offending conduct (higher culpability) and the profound harm caused to children during their formative years (**Key Finding 2**).

The median sentence length for rape (MSO) for digital–vaginal rape of a child and an adult are the same (3.0 years). This suggests there is a sentencing problem with this offence and the objective seriousness of the victim being a child is not being adequately recognised.

VSAC compared sentencing practices for the offences of sexual penetration with a child under 12 with rape and found there was evidence of differences between the two offences in approach to the treatment of harm and culpability and the categorisation of objective offence seriousness. Differences appeared to

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74 The Queensland Court of Appeal has recognised that 'many different factors can determine the objective seriousness of an offence, such as the nature of the attack, its duration, the degree of any planning, whether the offender voluntarily desisted, whether a weapon was used, the injuries suffered by the victim and other such matters': *R v Sprott; Ex parte Attorney-General (Qld)* [2019] QCA 116 [17].

75 SME Interview 8.

be due to the way violence was characterised, with the child cases often being described as less violent and the offender's behaviour presented in a way that 'diminished [their] agency and degree of force used'.

The Council observed language used in Queensland courts at times that similarly risks diminishing the degree of agency involved and use of violence that such offences necessarily entail – for example, describing the perpetrator's rape and indecent assault of an 8-year-old child as 'play' and 'fondling'.[76]

The importance of language is discussed further in **Chapter 14** and **Chapter 15**.

The Court of Appeal recently commented in a case involving one count of maintaining a sexual relationship with a child under 16 years and a separate count of rape that 'penile–vaginal rape of a pre-pubescent girl by a mature man is an intrinsically violent act' and the absence of 'accompanying or additional violence merely amounts to the identification of the absence of what would have been an aggravating feature'.[77]

As discussed in **Chapter 6**, this feature is a common element of rape and sexual assault offences committed against children and other vulnerable persons, and should not be viewed as suggesting that the offence falls into a lesser category of seriousness.

7.5.3 Conduct captured within the offence of sexual assault and objective seriousness

The offence of sexual assault captures a wide range of conduct. This makes determining the objective seriousness of this offence challenging to ascertain, and it may lead to inconsistency in sentencing practices for sexual assault.

The Council's sentencing remarks analysis found that the breadth of conduct captured under non-aggravated sexual assault (s 352(1)) ranges significantly in terms of both seriousness and the types of acts captured.

The UniSC research and the Crime Harm Index show that the Queensland community sees sexual assault as having a high-level objective seriousness. However, because of the wide range of contexts in which non-aggravated conduct occurs and the nature of these indecent assaults – ranging from acts such as the momentary touching of an adult victim's buttocks over clothing to an offender rubbing his exposed penis on the victim's bare genitals – sentencing outcomes vary considerably. In addition, if the offence involves the circumstance of aggravation (being or pretending to be armed with a weapon or in company), the offence will have a maximum penalty of life imprisonment (even if it involves a non-aggravated form of sexual assault).

The breadth of conduct and circumstances captured has the potential to impact community confidence in sentencing levels for this offence, particularly where there is a wide disparity between the maximum penalties that apply to these forms of offending and sentencing outcomes.

The framing of non-penetrative sexual assault and gross indecency offences is different in other Australian and international jurisdictions. Conduct falling within these offences also attracts different

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76 'He then fondled the girl's vagina (aged 8) … He then took his penis out of her mouth and had her play with it until he ejaculated'[3]: *R v Ruiz; Ex parte Attorney-General (Qld)* [2020] QCA 72 [3] (Sofronoff P).

77 *R v CDF* [2024] QCA 207, [35] (Bond JA, Brown JA and Kelly J agreeing).

maximum penalties, and the range of sentencing orders available to the court in sentencing are also different. For example, New South Wales has two offences that capture section 352(1) conduct: sexual touching[78] and sexual act.[79] Within each are simpliciter and aggravated forms of the offences with different maximum penalties.[80] For more information, see **Appendix 15**.

7.6 Comparisons of sentencing outcomes with other jurisdictions

7.6.1 Difficulties of cross-jurisdictional comparisons

There are substantial differences in the equivalent offences of rape and sexual assault and sentencing frameworks across both the other Australian jurisdictions examined and internationally.

The different statutory regimes for offences and sentencing frameworks that apply across jurisdictions significantly limit the ability to undertake such an analysis. For this reason, it has not been possible for us to test whether sentences in Queensland for sexual assault and rape are higher or lower than those in other Australian and international jurisdictions and the reasons for this.

In **Chapter 11**, we consider sentencing outcomes for select jurisdictions based on the Australian Standard Offence Classification scheme, which reports on outcomes for the classification 'Sexual assault and related offences'). This broad offence classification captures a wide range of offences and is not confined to sexual assault.

For these reasons, we cannot draw any robust conclusions from this analysis. It does, however, demonstrate that there are differences in sentencing patterns across jurisdictions, noting also that the available types of sentencing orders vary by jurisdiction.

7.6.2 The research of the Judicial Commission of New South Wales

A small number of Australian studies have attempted a comparison of sentencing levels and practices at an offence-based level. Of relevance to this review, the Judicial Commission of New South Wales ('Judicial Commission'), in a 2015 study, compared sentencing outcomes for rape committed against an adult victim sentenced from 1 July 2007 to 30 June 2013 across 3 jurisdictions: Queensland, New South Wales and Victoria.[81]

The Judicial Commission's study found New South Wales had the highest rate of full-time imprisonment for rape (called sexual assault; both non-aggravated and aggravated) (92.6%) compared with Victoria (87.0%) and Queensland (74.6%). However, when partially suspended prison sentences were factored in, the imprisonment rate rose to 91.3 per cent for Victoria and 97.5 per cent for Queensland (with 22.8% of imprisonment sentences for rape of an adult being partially suspended).

The Judicial Commission found the median head sentence for sentences of full-time imprisonment for sexual assault (rape) offences involving adult victims was highest in Queensland (84.0 months, or 7 years) compared with 72.0 months (6 years) in New South Wales and 60.0 months (5 years) in Victoria.

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78 *Crimes Act 1900* (NSW) ss 61KC–KC.
79 Ibid s 61KE.
80 Circumstances of aggravation are those in which: the accused person is in company or the complainant is under the authority of the accused person or has a serious physical disability or cognitive impairment: ibid s 61KD(2).
81 Georgia Brignell and Hugh Donnelly, *Sentencing in NSW: A Cross-jurisdictional Comparison of Full-time Imprisonment* (Research Monograph 39, Judicial Commission of NSW, March 2015) 3.2 'Sexual assault'.

The Commission acknowledged a potential reason for the higher median sentence in Queensland as being that partially suspended prison sentences were excluded from this calculation.[82]

As discussed in **Appendix 4**, the median custodial sentence for the rape of an adult for cases sentenced over the period July 2020 to June 2023, including partially suspended imprisonment sentences, was 5.5 years (ranging from 3.0 years for digital-vaginal rape to 6.8 years for penile–anal rape).

The Council's analysis suggests that current median sentence lengths more closely approximate sentencing outcomes in New South Wales and Victoria based on sentencing outcomes reported in the Judicial Commission's earlier study once partially suspended prison sentences are taken into account. However, this does not factor in whether sentencing patterns in New South Wales and Victoria have changed, given that the earlier study was based on data from 2007 to 2013, and whether sentences for these offences have since increased.

For example, Victoria has since had several statutory reforms and common law developments in relation to sexual offences. In 2021, VSAC examined sentencing outcomes for sexual offence cases sentenced over a 10-year period (from 2010 to 2019) and found that sentences for many offences had increased following those reforms and case law developments. For a summary of these developments, see **Appendix 10**.

VSAC reported that the average prison sentence for rape increased to nearly 7 years for offences sentenced as 'standard sentence offences',[83] up from 5 years and 8 months.[84] It attributed this change as possibly the result Court of Appeal calling for an increase in sentencing levels for digital rape offences.[85]

VSAC found average prison sentences for sexual penetration with a child aged under 12 years had also increased, but with some fluctuations over time. For cases sentenced during the most recent 2 years of the reference period (2018 and 2019), the average sentence at a charge level was 4.8 years (in 2018) and 5.7 years (in 2019), while the average total effective sentence was 8.0 years (in 2018) and 8.3 years (in 2019).[86] VSAC found that the charge-level increase was statistically significant although the case-level changes were not.[87]

In comparison, the average custodial sentence length for the rape of a child in Queensland based on the Council's analysis of 3 years of data (2020–21 to 2022–23) was 5.4 years (similar to the Victorian charge-based average, but below the total effective sentence average), with a median sentence length of 4.8 years (see further **Appendix 4**).

The Victorian and Queensland sentencing data, however, is not directly comparable given that VSAC's analysis relates to offences against children under 12 years while the Council's analysis is for rape of child under 18 years, as well as due to the very different sentencing practices and frameworks that apply.

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82 Ibid.
83 See Chapter 8 for a discussion of the standard sentences scheme.
84 Sentencing Advisory Council (Victoria), *Sentencing Sex Offences in Victoria: An Analysis of Three Sentencing Reforms* (Report, June 2021) ix.
85 Ibid referencing *Shrestha v The Queen* [2017] VSCA 364 (11 December 2017). In this case, the Court of Appeal dismissed the appeal against a sentence of 6 years' imprisonment with a non-parole period of 4 years for digital rape in circumstances where the applicant, who was found guilty following a trial, had followed a woman in the early hours of the morning on seeing her leaving a nightclub, grabbed her from behind and forced her to the ground.
86 Sentencing Advisory Council (Victoria) (n 84) 52–53.
87 Ibid 53.

Further, the Victorian offences have a lower maximum penalty of 25 years, compared with a life sentence in Queensland.

For example, in Queensland a common approach in sentencing a person for two or more offences is for a court to impose a 'global sentence' for the most serious offence, taking into account the total criminality involved in the offending behaviour (commonly referred to as 'the *Nagy* approach'),[88] rather than to cumulate sentences for some or all sentenced offences. In contrast, in Victoria, due to the operation of the serious offender provisions in Part 2A of the *Sentencing Act 1991* (Vic), sentences are more commonly ordered to be served cumulatively. This is what is meant by the 'total effective sentence' in Victoria (the sentence imposed taking into account all sentences for all offences sentenced and orders for cumulation). For more information, see **Chapter 15**.

The standard sentences scheme, discussed in **Chapter 8** and in **Appendix 10**, may also be impacting sentencing levels. The VSAC report noted only three cases involving charges of sexual penetration with a child under 12 years had been sentenced to which the standard sentences scheme applied with outcomes ranging from 6 years and 3 months[89] to 9 years (for a digital–vaginal rape).[90] The latter was reduced on appeal to 6 years and 6 months with a non-parole period of 4 years[91] on the basis that the offending involved 'an isolated example of relatively fleeting digital penetration', the seriousness of which fell 'well towards the lower end' of the range of seriousness, and 'the sentence imposed failed to reflect adequately the applicant's traumatic and disadvantaged past or his associated mental health problems'.[92]

In Queensland, the highest sentence for the digital rape of a child during the 3-year data period examined by the Council was a life sentence imposed on a repeat child sex offender sentenced under the repeat serious child sex offences scheme. The operation of this scheme is discussed in **Chapter 8**.

The next highest sentence for the digital rape of a child was a sentence of 10 years' imprisonment (attracting a mandatory serious violent offence declaration) on a person convicted following a plea of guilty of 3 counts of rape of a 6-month-old baby while drug affected, sentenced alongside several other child sexual offences and child exploitation material offences.

However, in the vast majority of cases where digital rape of a child was the MSO, the sentence was one of 5 years or less (88.0%; n=66/75).

This limited comparison highlights some of the complexities of undertaking this type of cross-jurisdictional comparison.

88 See *R v Nagy* [2004] 1 Qd R 63.
89 *DPP v Aneterea (A Pseudonym)* [2019] VCC 1721 (22 October 2019) [69].
90 *DPP v McPherson* [2019] VCC 1745.
91 *McPherson v The Queen* [2021] VSCA 53.
92 Ibid [27]–[28], [30] (Priest and T Forrest JJA).

7.7 Evidence of alignment between penalty types and sentencing purposes

The Terms of Reference ask us, in assessing adequacy, to expressly consider the sentencing purposes of just punishment, denunciation and community protection.[93] Other relevant sentencing purposes under section 9(1) of the PSA are rehabilitation and deterrence.

In this section, we discuss whether current sentencing practices with respect to the types of penalties imposed reflect the purposes of sentencing, including those viewed as being most important by the general community, victim survivors and other stakeholders.

We have concluded that current penalty and parole options are inadequate in several respects. This is explored in greater detail in **Chapter 11**.

7.7.1 Sentencing trends and purposes

In section 7.7.4 below and in **Chapter 11**, we summarise the evidence about the efficacy of different types of sentencing orders in meeting relevant purposes of sentencing and consider this evidence in the context of current sentencing practices. This includes the following:

- For rape, there was increasing use of partially suspended prison sentences, with a corresponding decrease in the use of imprisonment. Imprisonment was still the most common form of penalty being imposed in just under two-thirds of cases (64.7%) in the 3 data periods (2020–21 to 2023–24) compared with just under one-third of sentences being partially suspended (30.7%). For 2023-24, partially suspended prison sentences continued to represent over 30 per cent of sentences imposed for rape.
- For non-aggravated sexual assault:
    - In the Magistrates Courts, overall, the increasing use of sentences of imprisonment and wholly suspended prison sentences (for the period 2020–21 to 2022–23, these represented 19.3 and 26.8 per cent of all sentencing outcomes respectively), together with the decreasing use of monetary penalties (16.6% of penalties imposed). Wholly suspended prison sentences, probation, imprisonment and monetary penalties were the most common forms of penalties imposed.
    - In the higher courts, the high use of wholly suspended prison sentences relative to other penalty types (for the recent three-year period examined (July 2020 to June 2023) accounted for almost half of penalties imposed (45.3%), followed by partially suspended prison sentences (18.2%) and imprisonment (10.9%). The trend of increasing use of wholly suspended and partially suspended prison sentences has continued based on data for the most recent financial year (2023-24).

This suggests that in some rape cases, to guarantee certainty of release, courts may prefer to set a fixed release date (in circumstances where a sentence of 5 years or less is open) over imprisonment with parole eligibility. The potential reasons for this are discussed in **Chapter 11**. For non-aggravated sexual assault,

93 Appendix 1, Terms of Reference.

it suggests an increasing preference for custodial penalties, with wholly suspended prison sentences commonly being ordered across both court levels.

A person subject to a suspended prison sentences must not commit an offence punishable by imprisonment during the operational period of the order. If they do, they risk having the remainder of the sentence activated. In contrast to imprisonment with parole, the person is not actively supervised in the community or required to engage with treatment and program interventions as a condition of their sentence. When a person is being sentenced for more than one offence, it is possible for a court to make a supervised order alongside a suspended prison sentence, such as probation (although the Council heard during consultation that any programs the person must attend could only relate to the offence the probation order was attached to, which may not be a sexual offence). This is not possible if the person is being sentenced for only one offence.

7.7.2 Community and stakeholder views

Community views

As discussed in **Chapter 5**, when initially asked about the importance of sentencing purposes for rape and sexual assault, participants in the UniSC research considered denunciation, deterrence and punishment equally important for sexual assault, and punishment (followed by community protection) as the most important purposes for rape offences.

However, when provided with a specific case scenario for each offence, the views of participants changed. Community protection (followed by punishment) became the most important sentencing purpose for sexual assault. For rape, all sentencing purposes (besides deterrence) were weighted equally.

This demonstrates that the purposes which are important will be case specific with:

- community protection linked to the perceived dangerousness of a perpetrator;
- denunciation viewed as having value when responding to family and domestic violence; and
- punishment favoured in circumstances involving a vulnerable victim survivor or where the offending made the community vulnerable.

Community members were not asked for their views about the extent to which they considered different penalty types met the intended purposes of sentencing.

Consultations and submissions

As also discussed in **Chapter 5**, community members and stakeholders who attended our consultation events, participated in one-on-one interviews and made submissions varied in their views about the adequacy and appropriateness of current sentencing practices and outcomes in meeting intended sentencing purposes.

Generally, legal stakeholders thought 'sentencing for sexual assault and rape offences adequately reflect the purposes of sentencing and the seriousness of these offences' and that the current purposes 'strike an appropriate balance between reflecting the interests of the victim, the community and the offender'.[94]

However, they supported giving courts more options in sentencing, such as the ability to fix a parole release date and to combine suspended prison sentences with supervised non-custodial orders when sentencing for a single offence, in support of the sentencing purposes of community protection and rehabilitation.

The inflexibilities of the current sentencing framework and barriers to the use of certain types of orders were viewed as likely contributing to the high proportion of sentencing orders for rape and sexual assault that do not involve supervision or a requirement to engage in treatment or other forms of interventions.

Victim survivors and victim advocacy and support stakeholders, while generally of the view that sentences were inadequate, raised concerns that suspended prison sentences do not deliver adequate punishment and denunciation, given the nature and seriousness of sexual assault and rape.

The high use of suspended prison sentences was seen as problematic. At our consultation event in Cairns, for example, we were told that victim survivors often view a suspended prison sentence as 'weak' or 'disappointing' outcome and feel it was not worth going through the process at all, particularly as there is no requirement for the person to participate in any programs or comply with any conditions (other than not to reoffend).[95] They were described as 'a bit of a "nothing" sentence'.[96]

Victim survivors confirmed these views, with one victim survivor with whom we met viewing the outcome in her case, which involved the imposition of a suspended prison sentence, as failing to deliver proper accountability to the person for his actions and not requiring him to receive any psychological treatment or support.[97] Another victim survivor was concerned that orders such as suspended prison sentences, intensive correction orders and fines did not act as an appropriate deterrent.[98]

As discussed in **Chapter 5**, there were also concerns about the time required to be spent in custody prior to parole eligibility or release from custody. This again speaks to concerns about this period representing an adequate period for the purposes of punishment and denunciation.

Resourcing for programs in custody and in the community was viewed by several stakeholders as a barrier to ensuring the purposes of community protection and rehabilitation are met, with some calls made for treatment and services to be delivered in a consistent way across all correctional centres.[99] Barriers to accessing programs while on remand were also mentioned, given lengthy periods spent by some defendants in pre-sentence custody.[100]

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94 Submission 23 (Legal Aid Queensland) 2. See also, Submission 19 (Basic Rights Queensland) 3; Submission 30 (Youth Advocacy Centre) 2.
95 Cairns Consultation Event, 21 March 2024.
96 Ibid.
97 Victim Survivor Interview 7.
98 Submission 27 (Name Withheld) 1.
99 For example, see Submission 23 (Legal Aid Queensland) 11.
100 Ibid 19.

7.7.3 Subject matter expert interviews

Many participants in our SME interviews considered supervision was important for people convicted of sexual offences,[101] and the exclusion of court ordered parole for sexual offences impacted sentencing and limited judicial discretion.[102]

In the absence of other options, they reflected that courts may choose to suspend the sentence to ensure certainty of release (or, alternatively, make use of prison-probation orders where this option is available). Several participants remarked that this results in people on suspended prison sentences potentially not being under any supervision in the community,[103] with one participant suggesting suspended prison sentences should 'be a last resort for sexual offending'.[104] Another participant was concerned about how a wholly suspended prison sentence might look to a victim survivor, with no requirement to perform community service or pay a fine and to be under supervision.[105]

Several participants supported court-ordered parole being extended to sexual offences, allowing judges to set a fixed parole release date.[106] This would ensure the person was supervised in the community but also had certainty of release.

There was also some support for courts having a dual discretion to set either a parole release date or parole eligibility date (as previously recommended by the Council) and for the release of those given a parole release date, release being conditional on the completion of relevant courses while in custody.[107] They considered that this certainty of release (even if conditional) might translate into more people pleading guilty.[108]

The current rigidity of orders was considered by some to be a barrier to achieving sentences that met their intended purposes,[109] with one participant suggesting that a new form of community-based order might be more appropriate for some types of sexual offences.[110]

One practitioner commented on the ability to combine a suspended prison sentence with a probation order or immediate imprisonment of greater than 12 months with probation for a single charge as potentially beneficial providing courts with greater flexibility in sentencing.[111]

7.7.4 Research evidence

In **Chapter 11**, we consider relevant research evidence drawn from literature reviews commissioned by the Council concerning the known efficacy of different order types in meeting the purposes of sentencing. Findings discussed include:

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101 SME Interview 14, 16.
102 SME Interview 6.
103 SME Interviews 1, 4, 11.
104 SME Interview 1, an example of last resort is an offender who will be deported because they have failed the character test and parole would not be appropriate.
105 SME Interview 14.
106 SME Interview 3.
107 SME Interview 7. See also SME Interview 4.
108 SME Interview 7.
109 SME Interview 7.
110 SME Interview 11.
111 SME Interviews 1, 7.

- **Imprisonment supports the sentencing purposes of punishment and denunciation, but is unlikely to be an effective deterrent and its rehabilitative potential is limited:** 'Although imprisonment is undoubtedly effective at punishing offenders and denouncing criminal behaviour, research shows that it is not effective as a deterrent to further offending and it appears to reduce reoffending via incapacitation only to a limited extent.'[112]
- **Programs for sexual violence (including those delivered in custody) can play an important role in reducing reoffending:** 'There is a large [body of] literature on the effectiveness of offender rehabilitation programming, with consistent international evidence now available that programmes for sexual violence can play an important role in reducing reoffending.'[113]
- **Minimum non-parole periods may achieve the sentencing purposes of punishment and denunciation, but do not achieve deterrence and are unlikely to support rehabilitation and long-term community safety:** Evidence suggests 'the setting of non-parole periods does not achieve effective deterrence and fails to support rehabilitation but will incapacitate people in prison in the short term and result in longer periods of imprisonment. On this basis they can be considered to achieve the sentencing purposes of punishment and denunciation.'[114] However, '[m]ore and not less time on parole would allow time to engage in rehabilitative programmes' in support of long-term community safety.[115]
- **Parole is more effective than unsupervised release in reducing reoffending:** Parole is more effective than unsupervised release in reducing recidivism – although there are evidence gaps in assessing the effectiveness of parole for those convicted of sexual offences and the impact of court-ordered parole versus board-ordered parole and particular cohorts.[116]
- **Electronic monitoring while on parole appears to reduce reoffending cost-effectively:** Electronic monitoring appears to reduce recidivism cost-effectively, especially when used as a genuine alternative to imprisonment for those who have committed sexual offences and are assessed as high risk.[117]
- **Probation appears to be effective for those who commit sexual offences:** While probation appears to be effective for those who commit sexual offences, the evidence is weak.[118] 'Failure [on probation] appears to be more likely among those with a criminal history or substance abuse issues and may be more likely with low-level supervision and fewer treatment conditions.'[119]

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112 Karen Gelb, Nigel Stobbs and Russell Hogg, *Community-based Sentencing Orders and Parole: A Review of Literature and Evaluations Across Jurisdictions* (Prepared for the Queensland Sentencing Advisory Council by Queensland University of Technology, 2019) ('*QUT Literature Review*') 91. This report was informed by an earlier report prepared by Michelle Sydes, Elizabeth Eggins and Lorraine Mazerolle on 'what works' in corrections for Queensland Corrective Services (2018, unpublished).

113 Andrew Day, Stuart Ross and Katherine McLachlan, *The Effectiveness of Minimum Non-parole Period Schemes for Serious Violent, Sexual and Drug Offenders and Evidence-based Approaches to Community Protection, Deterrence, and Rehabilitation* (Prepared for the Queensland Sentencing Advisory Council by The University of Melbourne, August 2021) ('*University of Melbourne Literature Review*') 19 (references omitted). See also Lacey Schaefer et al, *Sentencing Practices for Sexual Assault and Rape Offences (Griffith University for Queensland Sentencing Advisory Council,* 2024) *('Griffith University Literature Review')* which reached a similar conclusion, citing several relevant systematic reviews and meta-analyses: 62–4.

114 *University of Melbourne Literature Review* (n 113) 12.

115 Ibid 23.

116 *QUT Literature Review* (n 112) 109.

117 Ibid xii.

118 *QUT Literature Review* (n 112) 112.

119 Ibid 146 [4.6.5].

- **Wholly suspended prison sentences of imprisonment have a small effect on reducing reoffending compared to imprisonment:** Wholly suspended prison sentences have been found to have a small effect on reducing recidivism compared with imprisonment, especially for repeat offenders (although this finding is not specific to those sentenced for sexual offences) and of being of potential benefit for those who are unable to access other orders, such as due to living in rural and remote areas.[120]
- **Reoffending rates for partially suspended sentences of imprisonment may be higher than for wholly suspended sentences:** There is 'no robust research on the effectiveness of partially suspended prison sentences' and '[w]hat little research exists finds that recidivism rates are higher following a partially suspended prison sentence than after a wholly suspended prison sentence'.[121] 'Recidivism rates following a partially suspended prison sentence appear to be lower among older offenders and those with no criminal history, but the evidence for this is weak.'[122]
- **Intensive correction orders are no more effective than a combined suspended prison sentence with a supervised order in reducing reoffending, but are more effective than short terms of imprisonment**: While intensive correction orders have been found of equal benefit as suspended prison sentences in reducing recidivism, evidence suggests they are more effective than short terms of imprisonment, however there is no evidence on the effectiveness of intensive correction orders among vulnerable cohorts.[123]
- **Community service appears to reduce reoffending more effectively than a term of imprisonment and a bond, but not as effectively as a fine:** Community service appears to reduce recidivism more effectively than a term of imprisonment and a bond, but not as effectively as a fine although this finding is based on studies of those convicted of non-sexual offences.[124]
- **Supervision as a condition can be useful in reducing reoffending provided it is supported by rehabilitation services and support:** Supervision in the community: 'best reduces recidivism when [it] adheres to the principles of effective correctional intervention and core correctional practices'.[125] In particular, 'Supervision that emphasises relapse prevention and assists offenders to identify, avoid, and resist crime opportunities may be more useful for individuals who have sexually offended.'[126]
- **The impacts of fines and other monetary penalties on reoffending for those sentenced for a sexual violence offence is unknown:** The review of research evidence conducted by Griffith University for this review did not find any relevant research literature related to monetary penalties for sexual assault and rape offences.[127] Generally, there is insufficient evidence to assess the effectiveness of monetary penalties in preventing crime or deterring reoffending.[128] As discussed

120 Ibid 115
121 Ibid xii.
122 Ibid.
123 Ibid xiii.
124 Ibid xiv. The study referred to in support of this finding was focused on adult offenders convicted of aggravated drink-driving (a third or subsequent conviction), drink driving (first or second offence), shoplifting (estimated value under $500) and common assault: see Michelle Morris and Charles Sullivan, *The Impact of Sentencing on Adult Offenders' Future Employment and Re-offending: Community Work Versus Fines* (New Zealand Treasury Working Paper 15/04, June 2015).
125 *Griffith University Literature Review* (n 113) 53.
126 Ibid.
127 Ibid.
128 Ibid.

in **Chapter 11**, generally fines are intended primarily to serve a punitive purpose rather than a rehabilitative one.

7.7.5 Assessment of adequacy of penalty types in meeting sentencing purposes

In **Chapter 11**, we discuss several aspects of Queensland's sentencing framework that we consider should be changed to better meet the purposes of sentencing taking into consideration:

- the apparent disconnect between sentencing levels and community, victim survivor, support sector stakeholders and Parliament's views of the seriousness of rape and aggravated sexual assault – in particular, where these offences are committed against children;
- concerns by many victim survivors and victim advocacy and support organisations that some form of orders, and in particular suspended prison sentences, fail to adequately recognise the seriousness of this offending and to hold the perpetrator accountable for their actions, as well as the limited time between a person being sentenced and being eligible for release on parole or on a suspended prison sentence;
- the impacts on sentence of people spending extended periods in pre-sentence custody, which historically has limited opportunities for program engagement and completion, and for the person to be supervised for an adequate period on their release in the community;
- the increased use of partially and wholly suspended prison sentences that do not involve supervision or conditions, such as treatment and program conditions;
- the continued, although decreasing, use of fines for non-aggravated sexual assault, which given the nature of the rights violated, may not be appropriate.

We discuss our concerns about the use of orders, in particular, suspended prison sentences– noting the existence of substantial evidence that supervision is an effective means of reducing risks of reoffending, particularly where such supervision is 'active, high-quality and has a rehabilitative rather than a surveillance focus'.[129]

We note several factors contributing to these key sentencing trends, including:

- restrictions on the availability of court ordered parole for sexual offences under Part 9 of the PSA;
- lengthy periods spent in some cases by people in pre-sentence custody by some people and historically, the limited access of remand prisoners to programs in custody which may take some time to complete before parole is granted;
- the inflexibility of current sentencing orders and conditions ordered under them, including the inability for a court to order a suspended prison sentence alongside supervised orders, such as probation or community service, when sentencing a person for a single offence.

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[129] Neil Donnelly et al, 'Have the 2018 NSW Sentencing Reforms Reduced the Risk of Re-offending?, (Crime and Justice Bulletin, No 246, NSW Bureau of Crime Statistics and Research, March 2022) 20, citing James Bonta and D A Andrews, *Risk-need-Responsivity Model for Offender Assessment and Rehabilitation: 2007-06* (Public Safety Canada, Carleton University, 2007); Wai-Yin Wan et al 'Parole supervision and reoffending' (Trends and Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014); Wai-Yin Wan, Suzanne Poynton and Don Weatherburn, 'Does parole supervision reduce the risk of re-offending?' (2015) 49(4) *Australian and New Zealand Journal of Criminology* 497.

Our views are discussed below.

7.8 The Council's view

7.8.1 Sentencing outcomes for rape

Key Finding

4. **Penalties imposed for rape are not adequate**

Penalties currently imposed on sentence for rape do not adequately reflect the seriousness of this form of offending and the purposes of sentencing, including punishment, denunciation and community protection – particularly as these relate to offences against children.

See **Recommendations 1, 5, 6, 7, 8 and 10.**

There is a problem with sentencing outcomes for rape

Based on the evidence gathered and the Council's analysis, we have found that there is a problem with sentencing levels and penalty types for rape in Queensland in that:

- too much emphasis is placed on the type of penetration conduct when assessing offence seriousness rather than on issues of harm and perpetrator culpability;
- sentences do not reflect the seriousness of this form of offending, given the significant infringement of the rights of victim survivors, particularly with respect to offences against children;
- the increasing use of partially suspended prison sentences is a problem as a court has no ability to attach supervision, treatment and program conditions; and
- the current structure of the SVO scheme means very few discretionary declarations are made for rape sentences of less than 10 years, with parole eligibility commonly set at or below one-third of the head sentence, and the mandatory nature of the scheme as it applies to sentences of 10 years or more means it likely is exerting downward pressure on head sentences at or just below the 10-year mark.

Too much emphasis placed on the categorisation of types of rape

The Council's analysis of sentencing outcomes for rape, discussed in section 7.3.2, and in more detail in **Appendix 4**, shows penile–vaginal and penile–anal rape are commonly treated as more serious than acts of digital and oral rape.[130] This finding is supported by an analysis of sentencing remarks, sentencing submissions and advice provided by SMEs interviewed during the initial stages of the review.

In the case of rape, the Council has concluded that all types of penetrative conduct are objectively serious and there should be no distinctions made between the relative seriousness of rape based on conduct alone – see **Key Finding 3**.

130 'Oral rape' was defined for the purposes of this analysis as including forced penile–mouth penetration and lingual–vaginal and lingual–anal rape.

As discussed in **Chapter 6**, we share the Court of Appeal's concerns about the unhelpful 'compartmentalisation' of cases 'according to the specific "category" of sexual offending involved'.[131] This approach in a practical sense means sentencing practices for rape offences involving conduct considered to fall at the 'lower end of seriousness', such as digital-vaginal/anal, penile–oral rape and lingual–vaginal/anal rape, are sentenced according to submitted sentencing 'ranges' that perpetuate a false dichotomy between 'real rape' (meaning penile–vaginal or penile–anal rape) and other forms of penetration.

While it is true that penile–vaginal rape is the only form of rape conduct carries a risk of pregnancy for some victim survivors, in our view this places too much emphasis on this aspect and risks undervaluing the significant psychological (and sometimes physical) harm that can arise from other forms of non-consensual sexual acts. Similarly, while penile–oral rape carries a risk of the victim contracting a sexually transmitted infection (albeit lower than for vaginal or anal rape),[132] it is only in the context of penile–vaginal and penile–anal rape that this factor is generally mentioned. The focus on such considerations serves to further compartmentalise these acts by attributing them presumed harms or risk of harms.

It was not the intention of the Taskforce on Women and the Criminal Code, which recommended expanding the definition of rape beyond non-consensual penile–vaginal and penile–anal penetration. that other acts of rape should be treated as involving a 'lesser' form of harm and culpability. This was particularly the case for forced oral sex, which had formerly attracted a maximum penalty of 14 years' imprisonment. [133] The Taskforce observed that the lesser penalty that then applied did 'not accord with many women's views of the relative seriousness of the conduct'.[134]

The Taskforce countered concerns that 'extending the definition to encompass more acts of sexual penetration may "devalue" the offence', thereby impacting the willingness of juries to convict by referring to the 'educative function' of the law. The Taskforce referred to submissions received in support of these reforms and the psychological harm that could be sustained.[135]

While it is beyond scope of this review to consider changes to the substantive criminal law in Queensland, we acknowledge developments in jurisdictions such as Canada to not distinguish between penetrative and non-penetrative sexual acts in the structure of their offences or to include acts that current are defined as 'sexual assault' in Queensland under section 352(2) as forms of 'sexual intercourse' falling within their rape offence equivalents (see further **Chapter 8**). These developments signal a clear and intentional move away from a focus on the act involved to an assessment of culpability of the person

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131 *R v Wallace* [2023] QCA 22, [45] (Dalton JA) ('*Wallace*'). See also Bowskill CJ at [13] endorsing observations made in *R v Wark* [2008] QCA 172 by McMurdo P (at [2]), Mackenzie AJA (at [13]-[14]) and Cullinane J (at [36]).

132 For more information, see Queensland Health, 'Oral Sex and STIs' (web page, published 29 May 2024), reporting on relevant evidence regarding risks https://www.health.qld.gov.au/newsroom/features/oral-sex-and-stis-be-safe-before-you-head-down#:~:text=While%20the%20risk%20of%20contracting%20most%20STIs%20from%20oral%20sex.

133 *Taskforce on Women and the Criminal Code Report* (n 23). See also *R v AM* [2010] 2 NZLR 750 in which the New Zealand Court of Appeal said, with reference to similar reforms in New Zealand: 'an approach which treats [different forms] of violation as broadly similar in the sentencing context is consistent with the purpose of the rape law reforms. That is because one of the objects of the rape law reform exercise was to recognise that any act of sexual violation involves, as this Court put it in *R v Accused (CA 265/88)* "an act of violation to the body of another involving at the very least an invasion of privacy and loss of personal dignity"': 769 [68].

134 *Taskforce on Women and the Criminal Code Report* (n 23) 217.

135 Ibid 218, 220. The Taskforce noted the same concern about devaluing the offence of rape could be made of digital penetration, pointing to research in Victoria which found that 11 out of 18 Victorian judges considered the inclusion of digital penetration within the offence of rape '"devalued" or "trivialised" the "real offence"': ibid 218, citing Melanie Heenan and Helen McKelvie, *Rape Law Reform Evaluation Project Evaluation of the Crimes (Rape) Act 1991 Executive Summary*.

responsible and the nature and level of harm caused taking into account the significant infringement involved of the victim's human rights.[136] This is discussed further in **Chapter 8**.

By analogy in Queensland, most non-sexual forms of assault are graded based on harm (for example, bodily harm, grievous bodily harm or death) and culpability (for example, whether the harm caused was intended), as well as whether other aggravating circumstances are present (such as use of a weapon or the offence occurring 'in company') – not by the parts of the body involved in the assault.

As discussed in **Chapter 6**, we agree with the Court of Appeal that greater scrutiny is required regarding the approach of focusing primarily on conduct that, in essence, reflects developments in other jurisdictions. We agree with recent observations made by Chief Justice Bowskill that it is necessary 'to consider the particular circumstances of each case' rather than 'formulaic compartmentalisation of offending or generalisations as to what kind of rape is worse or more serious'.[137]

We also agree with Dalton J's comments about the over-reliance in submissions 'when comparing not just rape cases … according to a specific "category"'.[138] We consider the approach of only referring to cases involving the same type of penetrative conduct, while somewhat embedded in practice, to be outdated and not in line with contemporary understanding of the extent to which even a non-penetrative sexual assault can cause significant harm to a victim:

> An assessment of the seriousness of an offence of sexual penetration is not governed by whether the penetration involves a penile, digital, oral or other form of penetration, but, rather, depends on all of the circumstances of the offence. Consequently, consideration of reasonably comparable cases in the present case should not proceed by reference only to cases involving oral penetration.[139]

Sentencing practices for rape of an adult should be monitored, but immediate legislative reform is not recommended

Developments in Victoria discussed in **Appendix 10** in response to statements made by the Victorian Court of Appeal[140] demonstrate that an increase in sentencing levels for penetrative acts that traditionally have attracted lower sentences is achievable without the need for legislative reform.

In our view, the additional step of recommending changes to legislation should only be taken where it is not possible to achieve the desired change to sentencing practice without legislative reform.

Given the clear direction given by the Court of Appeal regarding the need to assess the serious of each offence based on its own individual circumstances, we do not consider it necessary to recommend any additional legislative guidance with respect to the treatment of different forms of rape conduct be introduced in support of this outcome. Our reasons are discussed in more detail in **Chapter 8**.

Rape of a child should be treated as being more serious and legislative reform is required

For offences of rape committed against children, we consider that there is a pressing need for sentences to increase, taking into account community views and the significant public interest in ensuring children – as the most vulnerable members of our community – are properly protected.

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136 In Canada, different circumstances of aggravation are also established.
137 *Wallace* (n 131) [13].
138 Ibid [45].
139 *The State of Western Australia v HNU* [2023] WASCA 6 [74] (Beech, Vaughan and Hall JJA agreeing).
140 *R v Shrestha* [2017] VSCA 364.

We also consider that there has been inadequate recognition of the various legislative reforms made over time under the PSA, which clearly signal Parliament's intention that sexual offences against children be treated more seriously than offences of a similar kind committed against adults.

We strongly endorse the view that the objective offence seriousness of a sexual offence is higher when the victim survivor is a child than for similar conduct committed against an adult. This is due both to factors relating to culpability and to the higher level of harm these offences cause to children (see **Key Finding 2**).

Despite views expressed by many of our SME interview participants that these offences are treated as being in an entirely different category to adult sexual offences and as being more serious, we have not seen this reflected sufficiently in sentencing outcomes.

For these reasons, as discussed in **Chapter 8**, we recommend amending section 9 of the PSA to introduce a new aggravating factor that applies to offences against children.

In our view, the problems associated with using the type of penetration as a starting point for assessing offence seriousness is even more pronounced where offences against children are concerned. We agree with the views of one SME interview participant, who commented:

> If you're talking about sentencing in the context of a child who is between 6 and 12, I don't really understand why the absence of vaginal penetration makes it a less, rather than a more serious, offence. Because I'd have thought any form of penetration, oral penetration, it's all horrendous if you're six.[141]

From the UniSC's research, it is clear that community members did not agree with the assessments of digital-vaginal rape as being in a 'lesser' category of offending where children were concerned. Community members focused on the long-term harm such offending causes to a child as a reason why the offending was much more serious, irrespective of the nature of the penetrative act.

While the findings of the UniSC's research have provided an important evidence base, we have also taken into account views shared with us during consultations, including by victim survivors, that sentences are inadequate and other evidence regarding current sentencing levels.

While we acknowledge the UniSC's findings are not necessarily representative of the views of all Queensland community members and were based on limited case studies, the findings are consistent with the findings of other research, discussed in **Chapter 5**. This includes research which similarly found, even adopting a more rigorous methodology in assessing community views, that there was a 'punitiveness gap' between judges and members of the public that could not 'be dismissed as a methodological artefact or a product of a lack of information'.[142] While this view was with respect to offences against children under 12 years, our research has found that this also applies in the case of older adolescent children, taking into account their higher level of vulnerability when compared with older adult victim survivors.

While median sentence lengths for rape offences against children are generally longer, they are not long enough, and do not adequately reflect community views of offence seriousness

The UniSC's research findings reinforce that the community considers sexual offending against children to be particularly serious and harmful.

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141 SME Interview 8.

142 Warner et al (n 3). Kate Warner et al., 'Measuring Jurors' Views on Sentencing: Results from the Second Australian Jury Sentencing Study' (2017) 19(2) *Punishment & Society* 180.

While we have found that evidence courts share this view, and sentences imposed are intended to recognise this, when custodial sentence lengths for rape of a child are compared with those for rape of an adult by conduct type, the increase or additional 'loading' that offences against children attract to reflect this higher level of vulnerability and harm can, at best, be described as modest. For some categories of conduct, sentencing levels were the same as for adult victims. For example, based on median custodial sentence lengths for rape from 2020–21 to 2022–23:

- median sentence lengths were the same for digital-vaginal rape regardless of whether the victim was an adult or a child (3.0 years); and
- for penile-vaginal rapes, there was a one-year difference between the median sentences imposed in circumstances where the victim was a child compared with cases involving an adult victim (7.0 years compared with 6.0 years).

The largest difference was between median sentences for penile-anal rape of a child, being 6.8 years for adult offences, and 9.0 years where the same conduct was committed in relation to a child.

Given that Queensland community members ranked the case involving digital rape of a child under 12 years as more serious than every other rape scenario presented involving an adult victim (including a case involving penile–vaginal and penile–anal rape committed by co-offenders), the disconnect between community views of offence seriousness and current sentencing levels becomes starkly apparent.

By extension, if the community rankings were applied to sentencing outcomes, it would mean that the digital rape of a child should attract a sentence that is, on average, at least as high as penile-vaginal rape of an adult victim – and arguably higher.

Table 7.3 summarises the implications of these findings should the digital–vaginal rape of a child (which was committed by a family member in the UniSC case example) be treated as being at least as serious as the penile–vaginal rape committed by a stranger.

Table 7.3: Ranking of seriousness – UniSC findings on community views mapped to median custodial sentence length

	Adult – digital (vaginal)	Adult – penile (anal) (DV)	Adult – penile (vaginal) stranger	Adult – penile (vaginal & anal) (in company)	Child < 12 yrs – digital (vaginal) (DV)	Not tested: Child <12 yrs – penile (vaginal)
Current median	3.0 years	6.0 years	7.0 years	8.5 years	3.3 years	8.0 years

The ranking of seriousness by community members also raises the question of whether sentences for penile–vaginal and penile–anal rape of a child, which are currently higher on average than where the victim is an adult, are high enough.

Other considerations

We acknowledge the difficulty of determining the degree to which sentences for offences against children do not sufficiently reflect community views of offence seriousness with any precision, taking into account differences in case characteristics.

More serious examples of rape committed against a child victim generally will occur in circumstances where there has been more than one unlawful sexual act committed against the child over a period of time. Offences occurring in this context are commonly charged and sentenced under section 229B of the *Criminal Code* as repeated sexual conduct and will constitute the MSO. In circumstances where rape was not the MSO, the overwhelming majority (82.9%) were offences sentenced under this provision.

Why offences against children should be treated as being significantly more serious than offences against adults

As discussed in detail in **Chapter 6**, there are many reasons why sexual violence cases involving child victims are often significantly more serious than those committed against adult victims and which justify treating these offences differently, including:

- that children are more vulnerable than adults to sexual violence due to their lack of maturity, judgment and experience;[143]
- the inherent power difference between children and adults, which enables adults to sexually violate children, typically without the need to resort to the use of threats or additional violence to overcome the child's will;
- the high level of emotional and psychological harm caused by sexual violence offending, which is 'particularly pronounced' for children and can interfere with their development and change the course of the child's life;[144]
- that a person who intentionally sexually offends against a child is 'highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child', because it involves 'the wrongful exploitation of the [child] victim by the offender', and because 'children are so vulnerable'.[145]

Our research has highlighted the importance of treating child sexual offending as being of a qualitatively different nature than the same type of conduct directed at adults. For example, in sentencing for rape of an adult, much attention is often directed at the 'level of force' or 'additional violence' used in the commission of an offence, when such force is generally not needed to commit an offence against a child due to their highly vulnerable position.

In circumstances where a sexual violence offence against a child is committed by a family member and involves a breach of trust, additional harm can be caused by compromising a child's relationships with their families and caregivers.[146] This may result in further trauma to the child victim, including the potential to lose trust in the ability of family members to protect them from harm.

Our recommendations to address this inadequacy as to sentencing levels are set out in **Chapter 8** (see **Recommendations 1, 3 and 4**).

143 *R v Friesen*, 2020 SCC 9 (CanLII), [2020] 1 SCR 424 [53].
144 Ibid [58].
145 Ibid [88]–[89].
146 Ibid [60]–[61].

The high use of partially suspended prison sentences is concerning due to the inability to attach supervision, program and treatment conditions

Discussed in **Chapter 11**, we are concerned about the high use of suspended prison sentences, including for rape, the increasing use of partially suspended prison sentences.

Applying the Council's fundamental principles guiding the review,[147] sentencing outcomes for sexual assault and rape should not only reflect the seriousness of these offences (**Principle 3**) but also provide for appropriate supervision (**Principle 4**).

The main problem with suspended prison sentences in Queensland, in our view, is their lack of flexibility. We also acknowledge the views of many victim survivors and advocacy organisations that wholly suspended prison sentences, in particular, do not adequately reflect the seriousness of sexual offending in support of the sentencing purposes of just punishment and denunciation.

In contrast to many other jurisdictions that have retained suspended prison sentences of imprisonment as a sentencing option, in Queensland a court is not permitted to order that the person be subject to supervision or to engage in rehabilitation and treatment and program interventions as part of their sentence. Under a suspended prison sentence, the only condition the person must comply with is not to commit an offence punishable by imprisonment.

The current approach is contrary to the substantial evidence that supervision is an effective means of reducing risks of reoffending, particularly where such supervision is 'active, high-quality and has a rehabilitative rather than a surveillance focus'.[148] Engagement in rehabilitation and program interventions has also been found to have an important role in reducing risks of reoffending. While those subject to a suspended prison sentence on their release from custody can engage in these programs and interventions voluntarily, there is no requirement to do so.

In practice, courts seeking to achieve certainty of release together with supervision and access to programs and other forms of interventions may use their ability to make a probation order alongside sentencing the person to a partially suspended prison sentence. However, there are several practical issues with relying on this approach as a means to achieve both certainty of release and supervision. First, in more than one in 4 cases, we found the person sentenced for rape had no co-sentenced offence. In this case, such an option is not open. Second, even if the person is being sentenced for more than one offence, the use of this form of combination order is reliant on the co-sentenced offence being of a lower level of seriousness than the rape offence to justify a probation order rather than imprisonment or another partially suspended prison sentence being ordered. Third, if the co-sentenced offence is a non-sexual offence (for example, a drug offence) the types of conditions and interventions to which the person is subject will not be tailored to address factors contributing to that person's sexual offending.

In our 2019 *Community-based Sentencing Orders Imprisonment and Parole Options: Final Report,*[149] we recommended reforms that would enable a court to order a suspended prison sentence alongside a community-based order, which might assist to some extent in overcoming this problem. In **Chapter 11**, we again make such a recommendation.

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147 For a full list of the fundamental principles, see Chapter 3.
148 See Neil Donnelly et al (n 129) and references cited in support.
149 Queensland Sentencing Advisory Council *Community-Based Sentencing Orders, Imprisonment and Parole Options* (Report, 2019).

In this same report, we recommended that the courts should also be provided with a discretion to set either a parole eligibility date or a parole release date when sentencing a person for a sexual offence provided the sentence is for a period of 3 years or less (aligning with the current eligibility criteria that applies to non-sexual offences). This would overcome the current anomalous position that a reform intended to ensure that sexual offenders were not subject to automatic release on community safety grounds has, on the contrary, resulted in more sexual offenders not being subject to any form of supervision at all while under sentence, in contrast to people convicted of non-sexual offences. This outcome clearly was not intended.

Making court-ordered parole available as a sentencing option to courts in sentencing for sexual offences is likely to result in more people being subject to parole supervision rather than released on suspended prison sentences without being subject to any form of supervision as part of their sentence. It would also provide an enhanced ability for corrective services officers to manage a person's risks in the community than is currently possible under other forms of orders (such as a suspended prison sentence ordered alongside a probation order, or an imprisonment-probation order). This is because if a person subject to parole fails to comply with the conditions of the order, the conditions of their order can be amended by the Parole Board or the person immediately returned to custody, in contrast to breaches of probation orders, which must be dealt with by a court.

The operation of the SVO scheme

As recommended following our previous review of the SVO scheme, we also recommend changes be made to this scheme, which would result in more serious offence declarations being made for sentences for rape of greater than 5 years, meaning they would be required under our proposals to serve at least 50 per cent of their sentence and up to 80 per cent of their sentence prior to parole eligibility. These reforms were previously recommended to balance the need for just punishment and denunciation, with the importance of promoting long-term community protection by allowing for a sufficient period of supervised release prior to the expiry of the person's sentence.

These changes, if adopted, will not only mean more people sentenced for rape will be required to serve a greater proportion of their sentence in custody prior to parole eligibility, but also should result in head sentences at and above the 10-year mark increasing, as a court will be able to reflect factors in mitigation by setting a parole eligibility date below the current fixed 80 per cent mark instead of only by reducing the head sentence.

7.8.2 Sentencing outcomes for sexual assault

Key Finding

5. There is a potential problem with the structure of sexual assault

There is a potential problem with the current structure of the offence of sexual assault under section 352 of the *Criminal Code* (Qld), which impacts sentence outcomes, considering:

- the breadth of conduct captured which ranges significantly in terms of both seriousness and the type of acts captured;
- the anomalous treatment of fellatio performed by a perpetrator on a male victim as aggravated sexual assault, which has a 14-year maximum penalty, when compared with penile-oral rape, which has a maximum penalty of life imprisonment; and

- the approach in some other jurisdictions, which separates acts involving self-penetration or being forced to penetrate another person as a separate offence.

See **Recommendation 4**.

There is a potential problem with sentencing outcomes for sexual assault

Based on the evidence gathered and the Council's analysis, we have found there is a potential problem with sentencing levels and penalty types for sexual assault in Queensland due to:

- the objective seriousness of some forms of offending, including based on the nature of the offending and the harm caused being poorly understood;
- the current structure of the offence of sexual assault;
- the need to ensure sexual assaults against children are treated as being more serious than offences against adults and for this to be reflected in sentencing outcomes;
- the high use of suspended prison sentences, fines and short prison sentences, which may not be appropriate given the nature of this offending.

Sentencing outcomes may be inadequate due to assessments of offence seriousness and the current structure of the offence

There is evidence that sentencing outcomes for sexual assaults are inadequate due to how offence seriousness is determined and the current structure of the offence.

We received significant feedback from victim survivors and the services that support them indicating that the seriousness of this offending is poorly understood and that sentencing levels should increase.

As discussed in section 7.4, sentencing outcomes for non-aggravated sexual assault suggest that courts may place greater weight on physical harm than psychological or emotional harm, and sentences should increase. When sentencing outcomes for specific categories of sexual assaults were examined (for example, under-clothing versus over-clothing and genital versus non-genital contact), outcomes for some forms of sexual assault more closely approximate those for AOBH (an offence involving an act of violence resulting in bodily harm). We further acknowledge the limited nature of this analysis, which did not take into account case-specific and defendant-specific factors that might have been important.

Some subject expert interview participants were concerned that sentences for these types of offences 'are usually quite low', given the seriousness of the behaviour. The following example was provided by one interview participant of how the seriousness of this form of offending can be significantly under-estimated:

> I don't think [prosecutors] treat it very seriously. 'That's not so bad.' That's the impression that I get. '"That's not so bad.' When you think, you know … Really? Really? This was a public place. Really? We don't walk around asking people to grab us on the vagina in a public place just because it's over the top of the clothes. Really? So yes, anything that's over the top of the clothes is not considered very serious.[150]

[150] SME Interview 14.

The majority of community members who participated in the UniSC research ranked the case example of non-aggravated sexual assault of an employee by their employer[151] as being more serious than burglary (at night, no harm caused to the occupants), despite burglary being more likely to result in a custodial sentence and median sentences for burglary being longer.

This evidence, when considered together with current sentencing practices, provides a strong indication that there is a sentencing problem.

Similar issues apply to forms of aggravated sexual assault captured within section 352(2) involving mouth-to-genital and mouth-to-anus contact. For example, from a victim-survivor's perspective, there likely is little difference in the degree of emotional and psychological harm caused by an offence involving non-consensual acts of cunnilingus charged as aggravated sexual assault (with a 14-year maximum penalty) or as rape based on the person's tongue penetrating the vagina or vulva, despite their very different maximum penalties. Often such distinctions come down not to what has occurred but to charging practices, what can be proven and plea negotiation processes.

Compelled oral penetration (non-consensual fellatio performed on a male victim survivor) in Queensland is also treated as being in a lesser category of seriousness attracting a lower maximum penalty than other forms of non-consensual penetrative acts, in contrast to the approach in most other Australian jurisdictions. There are also differences with other jurisdictions examined, including with respect to the breadth of conduct captured and the categorisation of self-penetration or being forced to penetrate another person as a form of aggravated sexual assault.

We recommend a reconsideration of these aspects of the current framing of sexual assault as part of work already underway in response to the Women's Safety and Justice Taskforce's report in response to this issue in **Chapter 8**.

In **Chapter 10** and **Chapter 14**, we also discuss several reforms intended to reinforce the seriousness of this form of offending. This includes enhancing the resources available to judicial officers and legal practitioners to inform sentence (**Recommendation 6**), ensuring that training and resources for prosecutors and criminal defence practitioners promote recognition of the objective seriousness of this form of offending and the significant impacts it has on victim survivors (**Recommendations 19 and 20**), and ensuring that judicial officers have access to ongoing professional development focused on sexual violence (**Recommendation 18**).

Sexual assaults against children should be considered as being more serious

We have concluded that, as is the case for rape, there is a potential problem with the treatment of offences involving older adolescent children (generally aged 15 years and above),[152] which may impact current sentencing practices in circumstances where the offence is charged as 'sexual assault' rather than as indecent treatment of a child under 16.[153]

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151 The sexual assault was described as an offence involving an employer touching an employee's breasts over the top of her clothing without her consent.

152 This is based on our analysis of Court of Appeal decisions and a sample of cases which found some involved victim survivors aged 15 at the time of the offence. This offence may be charged if the child is older than 12 years in circumstances where there is some question about whether the person knew the child was under 16.

153 See *Criminal Code* (Qld) s 210. Note, under 210(5), if the offence is alleged to have been committed in respect of a child of or above the age of 12 years, it is a defence to prove that the accused person believed, on reasonable grounds, that the child was of or above the age of 16 years. The accused person bears the onus of proof and must establish this on the balance of probabilities.

As discussed in section 7.2.1, the ranking by community members of a case study involving aggravated sexual assault (oral sex/fellatio performed by a teacher on a 16-year-old male student) is not consistent with median sentencing levels for this form of conduct.

Participants in this research viewed this case as being more serious than:

- a scenario involving sexual assault involving forced self-penetration with a sex-toy would be charged as a section 352(3) offence with a maximum penalty of life imprisonment, which also has a lightly longer median sentence (Pair 5);
- a scenario involving strangulation in a domestic setting (which has a 7-year maximum penalty), although the sexual assault offence had a shorter median custodial sentence length than strangulation (Pair 14).

In future, the conduct described in this case scenario may be charged under the offence to be introduced into the *Criminal Code* (Qld) of sexual acts with a child aged 16 or 17 under one's care, supervision or authority.[154] However, non-consensual acts may continue to be charged as aggravated forms of sexual assault, given that the maximum penalty for the described conduct would be 10 years, not 14 years, if charged under this new offence.

As discussed in **Chapter 2**, girls aged under 18 years are particularly vulnerable to being victims of a sexual offence representing 40 per cent of all victim survivors of sexual offences reported to police (compared with boys, who represented 8% of all victim survivors of reported sexual offences).[155] While male victim survivors represented a smaller proportion overall of people reporting being victims of a sexual offence than female victim survivors, over half (55%) of offences reported by men and boys occurred in the under 18 years age group.[156]

As is the case for rape, young people's higher level of vulnerability means these offences are objectively more serious both due to the higher level of harm that results to a young person who is still developing in their sexuality when subjected to non-consensual sexual acts, and the increased culpability of those who direct their unwanted sexual attention towards a young person.

For the reasons discussed in **Chapter 8**, we recommend the new aggravating factor should apply both to offences of rape and sexual assault.

The high use of suspended prison sentences, fines and short prison sentences may not be appropriate and better penalty options are needed

We are also concerned about the high level of use of wholly suspended prison sentences (now the most common penalty type for this offence, representing over one-quarter of sentencing outcomes) and the frequent use of monetary penalties in the Magistrates Courts (although we note that the use of these penalties is decreasing) (see further, **Chapter 11** and **Appendix 4**).

The reforms discussed above that would give courts a discretion to set either a parole release date or a parole eligibility date when imposing a sentence of imprisonment of 3 years or less would equally be beneficial in the sentencing of people for sexual assault for similar reasons as those outcomes above.

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154 *Criminal Code* (Qld) s 210A inserted by *Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Act 2024* (Qld) s 8. This section is yet to be proclaimed into force (at 1 December 2024).

155 Queensland Government, Open Data Portal, Victims numbers–police districts – monthly from January 2001 <https://www.data.qld.gov.au/dataset/victims-numbers-police-districts-monthly-from-jan-2001/resource/fb7388be-8186-4fbb-84a8-7dbfa63ff378> calculated based on figures reports for 2019 to 2023 at 7 November 2024.

156 Ibid.

However, the short duration of custodial sentences (median of 1.0 years for cases sentenced in the higher courts and 6 months for those sentenced in the Magistrates Courts) is of concern if the objective is not just to punish, denounce and deter, but also to promote the objectives of community protection and rehabilitation. The current length of sentence based on this median sentence length leaves little time for participation in programs or other treatment interventions, or for the person to be under supervision in the community prior to the expiry of their sentence. These same problems would apply even if courts were able to set a date for the person's release on parole.

This provides further justification for providing courts with the ability to make a community-based order alongside a suspended prison sentence when sentencing a person for a single offence.

In place of the existing range of community-based orders, we recommend, as we have previously, the introduction of a new intermediate sanction – a 'community correction order' ('CCO'), which can be tailored through the conditions imposed to meet the various purposes of sentencing while also responding to the individual factors contributing to offending.[157] The introduction of this form of order, in our view, will better enable conditions to be targeted to respond to issues associated with the person's offending behaviour, and to meet the important purposes of sentencing by allowing for a range of conditions.[158]

We acknowledge these reforms will have significant resourcing recommendations and may take some time to implement. We discuss these issues in more detail in **Chapter 11**.

7.8.3 Other issues impacting the ability of sentencing orders to meet the purposes of sentencing

The Council has identified several other issues regarding the appropriateness and adequacy of penalty and parole options that negatively impact the ability of these orders to not only meet the purposes of punishment and denunciation, but also rehabilitation and long-term community protection. These include extended periods being spent by some people in pre-sentence custody prior to sentence, which traditionally has limited opportunities for program engagement and completion and, if parole is applied for and granted, time under supervision in the community.

Stakeholders have also raised significant concerns about the adequacy of resourcing for programs in custody and in the community, which is a clear barrier to ensuring the purposes of community protection and rehabilitation are met, with some calls made for treatment and services to be delivered in a consistent way across all correctional centres.[159]

As discussed in **Chapter 3**, a fundamental principle adopted for this review has been that sentencing orders should be administered in way that satisfies the intended purposes of sentencing, and the services delivered under them – including programs and treatment – should be adequately funded and available across Queensland, both in custody and in the community (**Principle 8**). We continue to be of the view that services and programs delivered to offenders under sentence – and particularly those convicted of sexual assault and rape –should be:

- adequately funded as far as practicable, and universally available across Queensland;

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157 Ibid rec 9.
158 For example, community service, supervision, participation in rehabilitation activities, treatment, alcohol and/or drug abstinence and monitoring, non-association and residence (or non-residence) requirements, place or area exclusions, curfew, payment of a bond, judicial monitoring and electronic monitoring.
159 For example, see Submission 23 (Legal Aid Queensland).

- regularly evaluated with adherence to best practice standards; and
- appropriately targeted and tailored to meet the individual needs of offenders, taking into account factors such as the offender's age, gender, cultural background, mental health issues and any cognitive impairments they might have.

We discuss our findings in more detail and recommendations for reform in **Chapter 11**.